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Book Review
Klobuchar, Amy. Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age

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It is rare to come across scholarly work by a sitting lawmaker on a highly technical issue, written in a manner and with a purpose to make the public more conversant with esoteric issues that have a direct impact on their lives. This book by the Democratic Senator from Minnesota does exactly that, while foreshadowing tectonic shifts in competition policy by the Biden administration. A Chicago Law School alumnus, the author worked on major antitrust matters in the 1980s and is presently Chairwoman of the Senate Judiciary's Subcommittee on Competition Policy, Antitrust, and Consumer Rights. Through the book, the author presents a thoroughly researched manifesto for a sea change in competition law to keep up with the times in a manner that makes the Byzantine minutiae of antitrust enforcement comprehensible to the lay reader.

In her introduction, the author strikes a chord with the reader by citing the case of monopoly abuse by the pharmaceutical company Ovation. In 2008, it controlled the market for the only two approved drugs used for treating premature babies with a rare heart valve defect, and hiked up prices by 2000%. Despite the challenge, the courts upheld the hike based on the concept of different product markets for the two drugs. Through this example, the author demonstrates the immediate real–life consequences of rampant monopolisation allowed by the present state of antitrust laws.

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The first half of the book traces the history of antitrust in the United States in order to contextualise the circumstances that necessitated the establishment of antitrust law. Chapter 1 provides the historical background of colonised America and traces the origin of antimonopolist sentiment in the US. Chapter 2 takes the reader through the history of monopolistic consolidation in the US through the late 19th and early 20th centuries. Through Chapter 3, the author sets early US antitrust legislation in its political context of agrarian and industrial movements. Proactive antitrust enforcement of the "Progressive Era" (1890s–1920s) is brought out in Chapter 4. In a segue to the next half of the book, Chapter 5 traverses the last 100 years of US antitrust action, where the site of action shifted from the streets to the ivory towers, and explains how weakened legislation and antitrust enforcement led to the present state of corporate dominance, especially in the technology sector. In the second half, the book addresses present day challenges and future courses of action. In Chapter 6, the author brings out a direct link between weak antitrust enforcement and increase in income inequality, racial disparities, ineffective labour policies, threats to media freedom, increase in misinformation, and other threats to representative democracy posed by monopolistic consolidation in order to highlight why antitrust matters. Modern–day antitrust challenges of corporate consolidation, congressional inertia, and conservative courts in addition to new–age challenges posed by technology platforms are flagged by the author in Chapter 7. A "path forward," with a detailed roadmap of 12 challenges, 25 action points, and 10 ways that "we the people" can improve competition in markets concludes the book in Chapter 8, followed by a short conclusion calling for immediate action to reinvigorate the American competition policy.

The book features engaging illustrations and lithographed cartoons which bring to life the nuances of antitrust movements and contemporary resistance to monopolies through an appealing narrative. Just like the Ovation illustration, the author makes excellent use of real–life examples to link failed or successful antitrust action with its effect on not some abstract "market," but on individual market participants — consumers, producers, manufacturers — who are all people wanting to live a decent life.

As a staunch opponent of big tech monopolies, the author believes that antitrust law needs to keep up with the times. The suggestions are ambitious yet critical, and the author walks the talk by introducing many measures discussed in this book through her bill, viz., the Competition and Antitrust Law Enforcement Act, 2021.

Anti–monopolist sentiment in the US can be traced back to the 18th century, where the monopolist approach of coloniser Britain was met with staunch resistance from American colonists. It culminated in the Boston Tea Party of 1773, ultimately resulting in America's independence. This was a rebuke of "government–sponsored private monopoly," and hence, the Declaration of Independence was an "act of economic rebellion against monopoly power." Independence was followed by monopolistic consolidation of crucial industries — from oil to sugar, railroads, and to coal. The vehicle of "trusts" during the late 19th and early 20th centuries ("The Gilded Age"), through which shares of stockholders of various companies were transferred to a single set of trustees, essentially led to cartelisation through the elimination of competition, price control, onerous contracts on consumers, and labour control. The consequent monopolisation, though facing little resistance in courts, met with opposition from major labour unions as workers rebelled against low wages and high rents after comparing their earnings to the profits made by monopolists. The struggles of the agriculturalists, known as the Granger Movement, was pivotal as they protested big business agriculture, which leveraged railroad and production monopolies and left farmers penniless. This despair and destitution led to the enactment of anti–monopoly laws by individual states. However, their limited jurisdiction to effectively deter monopolies led to a call for federal legislation, which culminated in bipartisan support for the Sherman Antitrust Act, 1890, which allowed the prosecution of those who indulged in trade restrictions or monopolies as well as prohibited the act, attempt, or conspiracy to monopolise. However, the immediate post–Sherman Act period was characterised by lack of enforcement and a phase of *laissez–faire* economic policy where the market was expected to work itself out.

New life was breathed into antitrust enforcement by Republican president Theodore Roosevelt, who was known as "trustbuster" for his

active implementation of the Sherman Act. The Progressive Era, from the 1890s to 1920s, was marked by proactive antimonopoly enforcement with bipartisan support. The highlight of this period was the Clayton Antitrust Act of 1914, which "outlawed unfair practices and methods of competition affecting interstate commerce," thereby setting a "broader prohibition" that applied "more generally, to unscrupulous business conduct." The Act also prohibited exclusive arrangements with purchasers and distributors, thus closing the Sherman Act loopholes. It further outlawed "interlocking directorates in companies valued in excess of $1 million," in addition to civil and criminal penalties. This was followed by the Federal Trade Commission (FTC) in 1915, which is presently the top antitrust enforcer in the US. The upshot of this discussion is that the complexity attached with antitrust action did not deter mass political action for wanting a "square deal" from a competitive, capitalist market. The author argues that political consciousness for antitrust brought about through active public involvement, which galvanised the initial antitrust movement, needs to make a comeback to "make antitrust great again."

The last 100 years of antitrust action in the US have seen the site of antitrust action shift from the proverbial streets to the high towers, as brought out in Chapter 5, which serves as a link between the first and second halves of the book. A potpourri of exemptions carved out through various legislations and judicial decisions from 1922 to 1976 led to inconsistencies in the law, like the anomalous situation where baseball but not professional football was exempted from antitrust legislation. Diverging judicial views, as encapsulated in the 5–4 majority in *United States v. Columbia Steel Co.*, 334 US 495 (1948), led to the emergence of two distinct schools of antitrust jurisprudence: the Chicago school and the Harvard school. The author describes the Chicago school as advocating for limited enforcement, wherein "consumer welfare" maximisation was "the only legitimate goal of American antitrust," and this conception of "consumer" also included owners of monopolies as well. The "accumulation of wealth in the hands of a few" was an irrelevant consideration for antitrust law, and wealth creation was the ultimate goal of the market. In contradistinction, the Harvard school conceived of the goal of antitrust as seeking to "create or maintain the conditions of a competitive marketplace rather than replicate

the results of competition or correct for the defects of competitive markets." The author chronicles how the Harvard school ideology dominated the "activist era" of antitrust from the 1950s to 1970s, while the Chicago school rapidly rose in prominence from the 1980s, in tune with President Ronald Reagan's politically conservative regime, and focused on brazen cartel activities only. Monitoring corporate consolidation through data gathering was done away with too. The author reviews the later Clinton, Bush, and Obama eras with disappointment, noting that antitrust enforcement lost its heyday steam. This is dangerous since monopolies of the size not seen since the Gilded Age are making a comeback primarily through big tech, a warning that the author repeats throughout the book.

Concomitant with lax enforcement has been extensive "corporate consolidation." Mergers and acquisitions are leading to highly concentrated markets in online search, grocery, travel, health, etc. Agricultural inputs, food processing, and even toothpaste and sunglasses industries are not spared by such concentration. The author insists that "bigger does not mean better" and the "bigness" of corporates actually threatens innovation while harming consumer choice.

The US Supreme Court's record is not encouraging when it comes to antitrust action, and no plaintiff has won an antitrust case since the 2000s. This is coupled with rulings that made it "harder for litigants to successfully bring antitrust lawsuits, including antitrust class actions." The outlook for the future on this front is bleak, given recent appointments that have tilted the Court's balance further to the conservative end of the spectrum, which favours the Chicago school. Given that the Court operates majorly on the interpretation of general language of statutes, the author proposes specifically tailored legislation to address such matters.

The technology sector has been given excessive leeway in consolidation, especially through slap–on–the–wrist penalties via paltry settlements, despite grave antitrust charges. A strong case for "fresh thinking" is made with regard to tech platforms as well as healthcare. In this context, grave concerns have been raised on Google, Facebook, and Amazon forming new–age monopolies. A case is made for addressing prevalent "tying in" arrangements (wherein products/services are

bundled, thereby compelling consumers to buy other products/services in a separate market) by a legislative presumption that they are illegal in case the buyer/seller has a share of more than 50% or "otherwise has significant power" in the relevant market. A disturbing trend of "killer acquisitions" carried out by big tech companies "acquiring smaller companies, only to shut them down" with a view to end competition, best exemplified by Facebook's acquisition of Instagram and WhatsApp, has been strongly condemned. In connection with this, "look back" provisions are proposed, whereby previous mergers/acquisitions can be reinvestigated if conduct is found to be anti–competitive. In fact, the author's bill, the Merger Enforcement Improvement Act, is a step towards this end, requiring data from merged entities for the purpose of retrospective reviews. Another uniquely prevalent challenge faced in technology markets is "monopsonies," a market situation with a single buyer which manifests itself in forms of control over suppliers, partners, and employees, leading to anti–competitive practices such as low wages, "anti–poaching" agreements, and forced arbitration clauses. The addition of specific language in the Clayton Act to address such monopsonies has been strongly recommended. More generally, greater "megamerger fees" and penalties for antitrust violations are canvassed to create a deterrent effect while shoring up finances for enforcement. An institutionalised "whistleblower reward or bounty system" has also been recommended.

The law needs to be more accommodative of genuine plaintiffs. The Sherman Act places a high burden of proof on the plaintiff, whereby a monopoly is not an antitrust violation per se [Section 2]. Even in the Clayton Act, a prospective merger must be shown to substantially lessen competition or create a monopoly [Section 7]. The standard of "appreciable risk of harming competition" is recommended to shift the burden of proof away from the plaintiff. For "megamergers" specifically, the burden of "substantially" lessening competition should be altered to "materially" lessen competition. The author also calls for a legislative repeal of *Illinois Brick Co. v. Illinois* (1977) wherein, subject to limited exceptions, only direct purchasers of goods and services could sue for antitrust violations. Its intent is to broaden private antitrust enforcement, including class

action suits. These very complicated legal problems and solutions have been explained in an extremely commonsensical manner, requiring no significant background knowledge of the law to comprehend.

Another major theme discussed is the "sleeper issue" of "horizontal shareholding" wherein companies have common shareholders that alter their competitive behaviour by skewing shareholder incentives that would otherwise translate to making managers compete more, thereby reducing internal pressure within a "resembl[ing] company to offer greater old style competition trusts," most visible in the pharmaceutical, agriculture, and airline industries. Strict investigations of such acquisitions on the Modified Herfindahl–Hirschman Index and other such preventive measures are the need of the hour. Similarly, common ownership of competing brands creates the illusion of competition and must be seen as such.

On predatory pricing, the author suggests that the recoupment test be done away with so that plaintiffs are not burdened with demonstrating that the price rise is greater than that needed for the compensation amounts expended on predation. The author also calls for legislative enshrinement of the presumptive unlawfulness test in *United States v. Philadelphia National Bank,* 374 U.S. 321 (1963) for mergers resulting in more than 30% market share. In essence, the "benefit of doubt should no longer be given to big corporations and in favor of approving megamergers." These thorny issues are intricately and systematically engaged with through sparse use of legal jargon and liberal use of illustrations which, for the layperson, makes dry and often obscure legal issues come to life.

To drive home her point, the author highlights in great detail the impact of monopolisation and depressed wages on the quotidian lives of people, especially belonging to communities of colour, drawing attention to the error on the part of antitrust authorities to "totally ignor[e] labor markets." The author also builds on her case for antitrust law to address racial profiling, discriminatory hiring/promotion, and "redlining," observing that "[p]eople may not commonly associate antitrust laws with antidiscrimination efforts, but they should."

Connected issues of net–neutrality, disinformation, privacy violations, etc. caused by highly concentrated traditional and social media companies

pose a threat to representative democracy itself and necessitate strict scrutiny. Importantly, the author calls for envisioning a relevant market separately for new online media outlets, as opposed to traditional television and newspaper media. Additionally, a more complete set of measures through changes to patent protections, minimum wages, labour rights, etc., are required to address individual issues that also form elements of monopoly abuse.

Conclusion

This book is a seminal contribution towards mainstreaming competition law in the public discourse and educates readers about the nuances of the complex law and relating it to their everyday life in the simplest manner. In three words, its message is: demystify competition law, starting with replacing "antitrust" with "competition policy." The book's gravamen is that antitrust action in the US today is enmeshed with complex terminologies and economic concepts, but it doesn't have to be. Simple language and minimal legal jargon are an essential characteristic of the book, because the author's call for action is to catalyse a movement wherein demand for accountability comes from the people and is not relegated as a niche activity to be discussed only by specialists. In India, many such laudable measures have been undertaken by CCI in achieving its mandate of "competition advocacy" under Section 49 of the Competition Act, 2002.

President Biden's *Executive Order on Promoting Competition in the American Economy*, published a few months after the release of this book, significantly advances competition law in the United States. The author's warnings about big tech and new pseudo "trusts" through horizontal shareholdings should be well heeded in India, as we collectively enter a new digital age. Indian competition law must also keep pace with new techniques being employed in the digital age, and given the cross–border nature of technology giants, taking a leaf from comparative jurisdictions and international cooperation on monopolies is essential. This book is thus highly recommended for the practitioners, authorities, and general public in India.