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The Democrats' "Better Deal" is Neither Better nor a Deal

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In July 2017, U.S. Congressional Democratic leadership released a policy plank entitled "*Better Deal*"[1] in which they proposed a radical reinvention of antitrust law. As a partisan blueprint for a populist political agenda, the Better Deal may have some appeal, but most of its ideas are either ill-conceived or poorly structured.

I. Bad Ideas

#1: Big is Bad

The "Better Deal" seems to emanate straight from Louis Brandeis' pencil insofar as its organizing theme is that *Big is Bad*. While the document makes some noises about increasing market concentration and the reduction of competition—conventional antitrust ideas—it seems more concerned with growth in corporate scale regardless of any effects on competition: "*the extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.*"

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[1] *A Better Deal*, July 2017.

As an empirical matter, it's far from certain that growth in corporate size produces effects such as reduced wages and lost innovation. At least some empirical evidence suggests a positive relationship between employer size and wages—larger employers pay higher wages.[2] This, of course, is a separate question from whether employers with more market power pay higher or lower wages—which is also not settled.[3] Either way, it would be a singularly bad idea to predicate a "big is bad" antitrust policy on the assumption that bigger firms pay lower wages without some robust empirical evidence that this is actually the case.

It would also be a bad idea to adopt a "big is bad" policy for the purpose of spurring innovation, since there is little evidence that big firms innovate less than little ones. Even translated into the more conventional claim that monopolists innovate less than firms in competitive markets, the empirical case has not been secured, despite decades of trying. As Richard Gilbert has shown, the venerable Arrow v. Schumpeter debate remains unsettled.[4] Even prominent scholars who generally believe that increasing concentration may impair innovation acknowledge that link hasn't been proven at a macro level. As stated by Jon Baker, "*as a matter of economic theory, it is impossible to say for certain whether enforcement of the antitrust prohibition against monopolization, which might restrict the conduct of a dominant firm, will on balance enhance or reduce aggregate industry innovation in general*."[5] Michael L. Katz & Howard A. Shelanski add that "*the literature addressing how market structure affects innovation (and vice versa) in the end reveals an ambiguous relationship in which factors unrelated to competition play an important role*."[6] Similar conclusions have been reached by many others.[7]

When insinuating that big is necessarily bad, the Better Deal is based on shifting, unverified and potentially false foundations. When proposing that "*the largest mergers would be presumed to be anticompetitive and would be blocked unless the merging firms could establish the benefits if the deal*," the Better Deal offers to shift the burden of proof against "large" corporate mergers without any empirical basis for concluding that such mergers harm workers or innovation. Such a rule could destroy efficiency-enhancing integration based on unfounded speculation.

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2 *See, e.g.*, Charles Brown & James Medoff, *The Employer Size-Wage Effect*, 97 J. Pol. Econ. 51 (1989); Thierry Lallemand & Francois Rycx, *Employer Size and the Structure of Wages: A Critical Survey*, XLVI Reflets & Pespectives 2007/2-3.

3 *See* Daniel A. Crane, *Antitrust & Wealth Inequality*, 101 Cornell L. Rev. 1171, 1192-94 (2016).

4 Richard Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, 6 Innovation Pol'y & Econ. 180 (2006).

5 Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen/Kodak Rule*, 7 Geo. Mason L. Rev. 495, 512 (1999).

6 Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1, 22 (2007)

7 *See* for instance Douglas H. Ginsburg & Joshua D. Wright, *Dynamic Analysis and the Limits of Antitrust Institutions*, 78 Antitrust L.J. 1 (2012).

#2: Merger Review Should Be Concerned with "Fairness"

The Better Deal introduces a new concept, that of "*unfair merger*." The document argues for the creation of "*new standards to limit large mergers that unfairly consolidate corporate pow*er" and also "*harm consumers, workers, and competition*." Unfortunately, what constitutes a "*fair merger*" isn't specified in the document.

It's hard to argue in principle with the idea that "unfair mergers" should be prohibited, but there are good reasons why laws are generally written to prohibit more than simple unfairness in the abstract. Fairness is a highly subjective concept that depends critically on the values, preferences, and perspectives of the adjudicator. Even Section 5 of the FTC Act—which skirts the edges of the void for vagueness doctrine—doesn't prohibit "*unfairness*" in the abstract but rather "*unfair methods of competition affecting commerce*," a significantly more concrete standard that courts have interpreted largely (although not completely) in lockstep with the Sherman Act.
When would a merger that does not reduce competition and thereby imperil consumer welfare and economic efficiency be "*unfair*"? The instances are potentially as numerous as the eyes of the beholders. A merger that resulted in the closing of a plant in one state might be considered unfair to some workers, even if it increased efficiency and investment and resulted in more employment elsewhere. Another merger that put a middleman out of business might also be considered unfair to that entity, even if it eliminated double marginalization and resulted in lower prices to consumers. To be sure, tradeoffs such as these implicate fairness considerations, but not ones that can be justly and effectively administered through the rule of law.

II. Poorly Structured Good Ideas

#1: Post-Merger Monitoring and Competition Advocacy

The "Better Deal" presents two ostensibly new ideas to enhance antitrust review. The first is "*tough post-merger review*," including a power for regulators "*to take corrective measures*" if they find abusive monopoly conditions where previously approved measures fail to make good on their intended outcomes. The idea that the antitrust agencies should more systematically review consummated mergers makes a lot of sense, but not in the way the Democrats suggest.

Because of Hart-Scott-Rodino's pre-merger notification requirement covering most potentially anticompetitive mergers, most merger review is performed prospectively and predictively. There are many advantages to this system, but one major disadvantage—the agencies tend to allow or disallow mergers based on predictions rather than data about actual outcomes. Once the agencies have decided not to challenge a merger, they generally move on to the next case. In recent years, there has been some work done to create merger retrospective toolkits. The focus of these retrospectives is not to challenge mergers that turn out to be anticompetitive, but rather to refine the agencies' predictive tools so that future merger enforcement can become

more scientifically guided and accurate. In times of limited resources (which, of course, is all times to some extent), such retrospective exercises may seem like academic jaunts, but we think that they are essential to the continued improvement of agency performance. In particular, we would recommend institutionalizing the practice of merger retrospectives, including with feedback tools to sharpen the agencies' guidelines and enforcement practices.

But this is not what the authors of the document have in mind. Rather, the "Better Deal" contemplates that the agencies would continuously scrutinize consummated mergers in order to bring post-consummation challenges to deals that, with hindsight, turn out to be anticompetitive, even if such effects occur years down the road. That is no way to run a merger system. While it's already the case that Hart-Scott review does not lead to formal legal "approval" of a merger (in contrast, for example, to the EU system) and that the agencies therefore could challenge an anticompetitive merger that survived the agency review process up to the running of the statute of limitations (four years), the vast majority of merger enforcement is "speak now or forever hold your peace," for good reason. Allowing the agencies to give conditional blessing to a merger and then hover over the merged company for years with the constant threat of divestiture would create a "national nanny" culture in which the agencies became de facto regulators rather than competition enforcement agencies. The fear of post hoc divestiture orders would deter beneficial investments and tearing apart companies integrated for years would result in chaos and economic loss (for all of the reasons recognized by the D.C. Circuit in *Microsoft*[8]). It's a bad idea.

The Democrats second idea for enhanced antitrust review is the creation of a new consumer advocate to investigate complaints about anticompetitive conduct, "*research current market activities, and proactively recommend competition investigations to the*" antitrust agencies. Apparently, the "Better Deal's" drafters are unaware of the history of the Federal Trade Commission, which was designed to do almost exactly that. As envisioned by Congress in 1914, the FTC was supposed to be a primarily investigatory and advocacy agency, collecting information, making reports, and assisting the Justice Department in a variety of ways (such as sitting as a special master in equity on remedy questions). Of course, the FTC has not turned out that way—it has become essentially a law enforcement agency co-equal to the Justice Department.[9] There are good arguments for encouraging the FTC to assume more of the role that it was designed to play, but little reason to think that creating a new agency duplicative of the FTC will make things better.

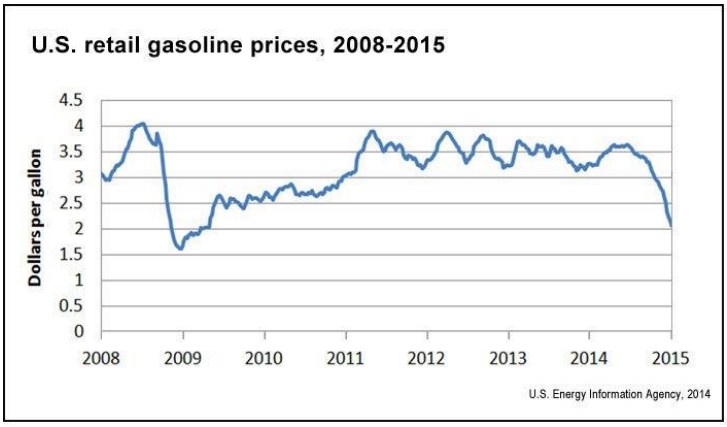
[8] *United States v. Microsoft Corp.*, 253 F.3d 34 (DC Cir. 2001).
[9] Daniel A. Crane, *Debunking Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835 (2015).

#2: More Control Means More Competition

The "Better Deal" describe five industries that are supposed to convince the readers of two things: (i) that something should be done about this "*big is bad*" problem, and that (ii) the solutions could be easily implemented. We take no position on whether any of these five industries is, in fact, subject to anticompetitive conditions today and, if so, whether lax antitrust enforcement is blame. We do take issue with the rather glib recitation of complaints about particular aspects of these industries to make the case for a radical departure from the existing bipartisan consensus on antitrust enforcement.

The first industry analyzed, airlines, is a good example of why detailed economic analysis rather than crowd-pleasing lines should be the basis of antitrust policy. The "Better Deal" asserts that lax antitrust enforcement in airlines has led to a decline in the quality of service. But the facts don't necessarily support this assertion. In the airline industry, customer satisfaction is on the rise for the fifth year in a row.[10] While we don't claim that this proves that all is healthy in the airline industry, we do claim that a much more robust study should be undertaken before jumping on the bandwagon of increased antitrust enforcement. In fact, to conduct an in-depth analysis of the state of the airline industry requires to take a large number of parameters into account, what the short paragraph in the "Better Deal" does not do despite reaching very peremptory conclusions, exposing as such its demagogic will.

We recognize that the "Better Deal" is a political document and does not purport to present a thorough assessment of any industry. But the Democratic leadership nonetheless has some accountability for making policy proposals that are grounded in facts rather than rhetoric. Shortly after the release of the "Better Deal," Democratic Majority Leader Chuck Schumer went on ABC News and asserted that oil prices always go up, but never go down.[11] The chart below speaks for itself.



[10] *See* *Despite Inflammatory Incidents, Airline Customer Satisfaction Keeps Improving*, J.D. Power (May 10, 2017).

[11] Chuck Summer, *Democrats Launch New Economic Agenda* (03'58), ABC News (July 23, 2017).

Overall, the "Better Deal" exhibits ungrounded faith that simply ratcheting up the degree of antitrust enforcement will benefit society. While we share the view that antitrust is an important ingredient of competition policy, the Better Deal overclaims dramatically when it asserts that "*without robust antitrust laws and enforcement, corporations lack the incentive to remain competitive and accountable and to compete on a level playing field*." We had competition before we had antitrust laws; antitrust laws are not the exclusive means of securing competitive markets. Companies compete because of the natural incentive to gain more customers by reducing their prices and improving the quality of their products. Antitrust law can improve their incentives to do so,[12] but should not be mistaken for the exclusive touchstone of consumer welfare.

Here is the real oddity of the "Better Deal:" the Progressive wing of the political spectrum has long accused the conservative wing of being not only unscientific, but antiscientific. But the apparent call of the "Better Deal" is to replace a long-standing tradition of bipartisan, empirically-oriented antitrust enforcement with a "Curse of Bigness" regime that panders to prejudice rather than adhering to fact. We can do better.

[12] And in fact, the "Better Deal" is all the more problematic as it focuses attention on to a political agenda rather than dealing with the urgency of several topics, for instance, on recognizing the concept of predatory innovation, *see* Thibault Schrepel, *Predatory Innovation: The Definite Need for Legal Recognition*, SMU Sci. & Tech. L. Rev (forthcoming 2018).