

# INCORPORATING NEW UNDERSTANDINGS OF INNOVATION INTO ANTITRUST LAW

## Introduction

Since the 1970s, regulators and policymakers have been predominantly guided by a hands-off, market-first approach to competition policy. A guiding assumption of this philosophy holds that firms—motivated by financial incentives and a healthy competitive market—innovate best without the heavy hand of government.

Recent years, however, have seen a sea change in antitrust law. A new crop of policymakers and scholars have challenged antitrust's laissez-faire approach, arguing that it overlooks modern economic research and the larger economic, political, and social harms of concentrated power—precisely the ills against which US antitrust law was designed to protect.

While this renewed perspective has proven remarkably effective in challenging traditional doctrine and outdated economic dogma, many assumptions surrounding innovation have been left intact. Antitrust still primarily relies on an outdated economic approach to innovation, which is assumed to be a product of individual (company) effort in response to discrete financial incentives. Accordingly, many US courts have adopted and simplified this incentive-oriented view of innovation to argue that monopoly pricing "induces risk taking that produces innovation and economic growth" (Justice Scalia in [Verizon v. Trinko](#)), giving more legal leeway to mergers and the active acquisition of monopoly power.

This framing overlooks how innovation actually takes place. Incentives matter, but they are only a part of the story. In [Innovating Antitrust Law: How Innovation Really Happens and How Antitrust Law Should Adapt](#), Ketan Ahuja argues that innovators, however strong their incentives are, need the ability to innovate. Unlocking innovation requires that people have access to the right mix of key inputs, capabilities, know-how, customers, partners, and funding. Environments with the right combination of these things are what actually produce innovation. Thus, innovation occurs for a whole range of reasons (financial and nonfinancial), and the public sector has a crucial role to play in shaping the rate and direction of innovation.

Incorporating this perspective into antitrust would have significant policy implications for how and when the government acts, and would lead competition policy to better support innovation that benefits innovators, consumers, and workers and that leads to stronger shared economic growth for all. Competition policy should reflect the fact that innovation "ecosystems" are at least as important as specific innovation incentives.

# Competing Models of Innovation

*The concept of innovation, heavily studied in economics and the social sciences, is a primary question in antitrust decision-making. Two main approaches have emerged.*

- **Innovation-as-Incentives:** *This perspective understands innovation as a result of the efforts of appropriately incentivized market actors, typically within a particular firm and responding to clear material rewards. Companies innovate when presented with sufficient profit incentive to develop inventions, and feel pressure to innovate to stay ahead of competitors. For instance, the enormous incentives (reopening the world economy and receiving government investment dollars) for developing a COVID-19 vaccine helped marshal capital and speed up the innovative process at companies like Pfizer and Moderna.*
- **Innovation-as-Capabilities:** *This perspective understands innovation to be a question of capabilities, knowledge-sharing across networks, the coordination of innovation communities around certain objectives, and substantial movement of people and ideas between firms. New innovations are almost always combinations of old technologies (or “capabilities,” where a capability is the capacity to do or make something). For example, in Silicon Valley, geographic proximity and shared networks have provided for movement of workers across firms and information sharing that has been a key enabler of innovative dynamism.*

## Impact of the Current Innovation Model on Policy

Because antitrust practitioners have largely adopted the Innovation-as-Incentives paradigm, competition policy has mostly focused on questions such as: *How much competitive pressure is a company under to innovate? How much can a company profit from its innovations within a market?*

This is born out in policy through:

- **A permissive approach to corporate consolidation.** This is especially true for “vertical” or “conglomerate” mergers, which involve companies merging with those outside their direct market. For instance, big tech platforms have been allowed to hoover up more than 400 startups. We can see this in favorable rulings on cases regarding companies like Meta (formerly Facebook) and Verizon, where regulators and judges have argued that the ability of companies to charge monopoly prices attracts business acumen and risk-taking, which spurs growth.
- **Robust intellectual property rights.** Under the assumption that profit motives are the primary driver of innovation, policymakers have embraced more robust intellectual property rights and patent rights, so that innovators reap commercial benefits from their creative efforts.
- **Restricted applicability of the “essential facilities” doctrine.** This doctrine requires a firm with market power, which uses a “bottleneck” in a market to deny competitors entry into the market, to share its “essential facilities” (such as utilities, owners of transportation facilities, or materials

protected by intellectual property) with smaller firms. Court rulings have dramatically restricted its applicability, for fear that requiring companies to share their facilities with their rivals could disincentivize innovation.

## Policy Implications of Adopting an “Innovation-as-Capabilities” Approach

Adopting the alternative “Innovation-as-Capabilities” framework would force policymakers and practitioners to grapple with a more diverse set of questions: *How can companies or individuals best gain access to the key inputs, capabilities, know-how, customers, partners, and funding that will lead to innovation? How can antitrust policy help create environments with the right combinations of these ingredients? What role does the government play in driving innovation?*

The implications of these questions could be:

- **Stricter standards for vertical and conglomerate mergers.** Mergers that remove a unique technology or economic “capability” from the market would be blocked with greater frequency. To ensure that existing capabilities remain accessible to many innovators rather than being swallowed up for exclusive use by some existing large company, vertical mergers would be held to stricter standards and more readily disallowed.
- **Strengthened essential facilities doctrine.** Antitrust policymakers would adopt a more assertive essential facilities doctrine. This approach would take dominant companies’ refusals to deal with their competitors more seriously, and would require them to license access to an essential facility when it is needed to develop a new product or service or make technological progress on a secondary market.
- **A ban on worker noncompetes.** Banning noncompete agreements would encourage a free flow of workers and information, strengthening networks and providing for wider innovation. Workers could more effectively put their skills to use where they want if they are empowered to move jobs.
- **Interoperability requirements.** Making technology and resources more widely shareable and compatible would level the playing field and strengthen the foundation by which firms across the spectrum could innovate. For instance, electric vehicle charging in the US is highly fragmented at the moment, with many different proprietary networks, apps, and subscription plans. This incompatibility stops many people from buying electric vehicles. Requiring EV charging stations to be interoperable could hasten the growth of this industry.
- **An embrace of industrial policy.** Many foundational technological breakthroughs have occurred through a blending of capabilities only achievable through government direction and coordination. Embracing the active role of government will help facilitate an innovation-forward competition policy that curates innovation communities, information sharing, and flexible technologies to open up access to key capabilities.

## Conclusion

Leaning into this new innovation paradigm can produce antitrust and competition policy that fosters innovation while benefiting firms, consumers, and workers and supporting stronger, shared economic growth. Establishing an affirmative government role in antitrust will be critical in shaping both the incentives and the ecosystems that create innovation, while ensuring its benefits are widely shared.



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