



POLICY SPOTLIGHT

Antitrust Policy and the Consumer Welfare Standard

TRACY MILLER AND ALDEN F. ABBOTT | MARCH 2021

The goal of US antitrust laws, broadly speaking, is to curb the efforts of firms to reduce competition in the marketplace or to create or maintain monopolies. As the digital platform companies Amazon, Apple, Facebook, and Google have grown in size and market power, some economists, politicians, and policy analysts have been calling for a far more aggressive antitrust policy, including major statutory changes. They claim that competition is weakening across the economy, allowing for unchecked abuses by huge enterprises, which could be corrected by antitrust enforcement.

There is certainly room for some improvement in US antitrust enforcement. Nevertheless, antitrust enforcers should stay focused on consumer welfare as the goal of competition policy in the United States. Proposals for major changes in the antitrust statutes that shift focus away from consumer welfare are likely to do more harm than good.

THE CONSUMER WELFARE STANDARD

Since the late 1970s, the Supreme Court has emphasized consumer welfare as the core antitrust policy goal, which was a change from earlier decisions emphasizing the evils of big business and the importance of protecting smaller companies. Judicial decisions under the consumer welfare standard subsequently have enunciated fact-specific standards that seek to preserve incentives for business conduct that benefits consumers. These decisions have also granted dominant firms greater freedom to engage in aggressive competition to better satisfy consumers. The focus of these cases has been whether business behavior tends toward maximizing output (taking into account quantity, quality, and improvements in innovation), consistent with unrestricted competition.

THE CASE FOR A DIFFERENT APPROACH

- Critics of current antitrust policy argue that enforcement has been ineffective, as evidenced by a decline in competition and an increase in the average market share of firms in recent decades.
- A growing number of scholars have concluded that the consumer welfare standard is inadequate. These scholars support a populist approach that pursues a broader range of objectives such as promoting fairness, protecting labor rights, and limiting monopoly as measured by firm size and market share.
- These concerns have resulted in studies by the House Subcommittee on Antitrust, Commercial, and Administrative Law and by the Washington Center for Equitable Growth that endorse digital

platform regulation, new Federal Trade Commission rulemaking, and legislation to strengthen antitrust laws, with a greater emphasis on bright-line rules.

- In February 2021, Senator Amy Klobuchar, chair of the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights, introduced legislation that would greatly toughen the standard for evaluating mergers and lower the bar for convicting a firm of illegal monopolization.
- Other expansive antitrust reform proposals, including possible regulation or structural break-ups of big platforms, may be considered by the House Subcommittee on Antitrust, Commercial, and Administrative Law.

DEFENSE OF THE CONSUMER WELFARE STANDARD

Reforming antitrust policy in a way that would abandon the consumer welfare standard is likely to do more harm than good.

1. Studies claiming that competition is declining are based largely on flawed premises. Although digital platform markets are often more concentrated than most markets in the past, firms with a large market share may still be under pressure to compete owing to the potential of existing firms and startups to develop innovative new products and services.
2. Reforms proposed by various antitrust critics such as breaking up dominant firms or prohibiting most mergers and acquisitions are likely to make consumers worse off, sacrificing the benefits of declining per-unit costs that accompany large-scale production and integration of complementary services controlled by one firm.

3. Broadening the scope of what constitutes a violation of antitrust law would likely create a great deal of uncertainty for firms as they seek to compete effectively and grow their market shares. Further, trying to assign weights to vaguely defined notions of fairness and labor rights along with consumer welfare would create confusion and could lead to arbitrary decisions that are not consistent with the rule of law.

CONCLUSION

Recommendations for antitrust policy improvements should reflect sound economics and have a strong factual basis. Current proposals to displace the consumer welfare standard and transform competition policy through dramatic changes in the antitrust statutes fail this test. They should accordingly be rejected by policymakers.

FURTHER READING

Alden F. Abbott, “US Antitrust Laws: A Primer” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, March 2021).

Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 6th ed. (St. Paul, MN: West Academic, 2020).

Tracy Miller and Trace Mitchell, “Dynamic Competition in Digital Markets: A Critical Analysis of the House Judiciary Committee’s Antitrust Report” (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, January 2021).

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