7

Antitrust

Efforts to expand the scope and enforcement of antitrust law are playing out on a global scale and, so far, have mostly targeted large technology companies. In the United States, the fight is being waged in the states, at federal agencies, and in Congress.

Expanding antitrust regulation is unnecessary and would harm consumers and the U.S. economy. Instead, policy makers should seek to narrow the scope and applicability of antitrust regulation to allow for greater private-sector innovation, economic growth, and technological progress. At the very least, policy makers should preserve the consumer welfare standard, which prioritizes the interest of consumers rather than those of companies.

Congress should:

- Place antitrust enforcement in one agency, the Department of Justice and remove antitrust authority from the Federal Trade Commission (FTC).
- Shrink the scope of antitrust policy in general.
- Oppose efforts to expand antitrust policy.

Sole Antitrust Authority at the Department of Justice

Placing antitrust authority solely at the Department of Justice will help reduce opportunities for politically motivated investigations and ensure fairness for defendants. DOJ lawyers must convince a federal court of the merits of a case. This is in stark contrast to the Federal Trade Commission, which acts as both prosecutor and judge through internal "trial-type" proceedings that can lead to biased decisions and cause uncertainty in markets. The One Agency Act, draft legislation introduced by Sens. Mike Lee (R-Utah) and Thom Tillis (R–N.C.) in the 117th Congress, would accomplish this.

Antitrust regulation is subject to politicization and often comes at the cost of economic liberty and progress. Consider the views expressed by some of the current appointees to the FTC. Chair Lina Kahn made a name for herself in academia by advocating for a vastly expanded role for antitrust regulation and a rejection of the consumer welfare standard. As FTC chair, she has undertaken these reforms in an atmosphere largely devoid of transparency and input from the public.

Taking antitrust authority away from the FTC would guard against much of the regulatory capture, excessive deference to agencies by Congress, and distortion of antitrust law away from consumer benefit.

Regulatory capture occurs when a regulated industry influences its regulators' actions for its own benefit. It is rampant in antitrust. Most antitrust cases are brought by companies seeking to hobble competitors. In cases brought by the government, competitors of the targeted firm often help antitrust enforcers behind the scenes, as Oracle did during the Justice Department's case against Microsoft in the 1990s, to the point of paying a pro-Microsoft group's janitors to hand over that group's office trash.

If the FTC's current case against Facebook parent company Meta reaches a settlement, Meta might welcome the onerous new rules on privacy and content moderation it might impose because smaller competitors might find it much more difficult to comply with those rules. In that way, antitrust could lock in Meta's dominance and make the market in which it operates less competitive.

Congress has given the DOJ and the FTC too long of a leash, and both agencies have abused that lack of oversight. Existing antitrust statutes are vague, especially in that they do not define key terms such as "monopoly" or "unfair or deceptive acts and practices." Much of antitrust law is based on case law rather than statutes, so agencies are free to change legal definitions and enforcement thresholds and expand their missions without congressional input. The FTC has been particularly bold in this regard and is now seeking to move antitrust enforcement away from the consumer welfare standard.

Under the consumer welfare standard, big is not automatically bad. Bigness is bad only if it results in harm to consumers, usually by some combination of restricting supply and raising prices. The FTC's current leadership instead wants to move to a "Big is bad" standard, such as prevailed during the Progressive Era, and to expand antitrust to address unrelated issues, such as democracy, inequality, environmental, and social justice concerns.

An agency can usually pursue one mission reasonably well or many missions poorly. Congress should remove the FTC's antitrust authority or, at the very least, set clear boundaries limiting it.

Scope of Antitrust Regulation

The creative destruction, competitive pressure, and price signals of the free market are much more responsive and efficient at promoting prosperity and consumer welfare than antitrust regulation. The rule of law, property rights, and voluntary exchange have produced more societal good, raised more people out of poverty, and empowered more individuals than any other economic arrangement in history. Antitrust regulation consistently lags behind market conditions, mistakes competitor harm for consumer harm, and invites political corruption and rent seeking.

One antitrust case against IBM filed by the Department of Justice in 1969 lasted for 13 years and still never reached a verdict. The product at issue, mainframe computers, were going extinct due to the rise of personal computers, so the DOJ dropped the case in 1982. The current case against Meta may follow a similar path because the company has been losing users and market share to competitors such as TikTok—before a court date has even been set. Meta is also responding to competitive threats by changing its products to keep up with the times.

Antitrust enforcement is supposed to protect the competitive process, not individual competitors. It doesn't work that way in practice. Companies can become big simply by being good at what they do. And greater size allows for economies of scale that make it easier for companies to offer better products to consumers at lower prices.

Antitrust is also becoming increasingly politicized. The Republican Trump administration put pressure on companies that the former president personally disliked. That included Amazon, which found itself in "a very antitrust situation" mostly because its founder, Jeff Bezos, owns *The Washington Post*, which featured coverage that was often critical of Trump. Some Republican politicians have targeted social media companies over perceived anti-conservative bias.

The Democratic Biden administration has also politicized antitrust policy, with potentially favorable media coverage influencing its decisions to bring cases, as with its recent threats to oil companies over rising gas prices. It has also sought to expand the government's antitrust authority to go after not just tech companies, but other industries ranging from health care to live events. Incumbent businesses and their lobbyists might welcome these cases, provided the settlements put up barriers to entry to potential competitors.

Consumers and competition would both best be served by repealing antitrust regulations in a variety of areas. These include restraint of trade and monopolization, horizontal and vertical mergers, collusion such as price fixing and market division, predatory pricing, strategic predatory behavior, price discrimination, minimum resale prices, exclusive dealing, tying and bundling, and technological lock-in.

The Sherman Act of 1890 prohibits restraint of trade and monopolization but does not define these terms. This has led agencies and courts to try to define these terms on their own, so the definitions have repeatedly changed over time and have been vulnerable to politicization. Either repealing these legal concepts or defining them narrowly would prevent them from being used to advance political agendas while giving companies needed stability.

The Federal Trade Commission is in the process of updating its merger guidelines as of this writing. These would affect both horizontal mergers, which are between two direct competitors in a given market, such as Ford and General Motors, and vertical mergers, which are between companies up and down the supply chain, such as an automaker and one of its parts suppliers.

The new guidelines would expand horizontal merger prosecutions beyond the current consumer welfare standard. Vertical mergers have long been largely exempted from review because they usually involve attempts to reduce transaction costs. Companies can choose to make something in-house or buy it from a supplier and will go with whichever option is cheaper. Those savings then get passed along to consumers.

Congress should block expanded merger enforcement and require the DOJ and FTC to stick to the consumer welfare standard in their enforcement decisions. Better yet, it can avoid these problems by removing Washington from the merger business altogether.

Collusion is another common antitrust allegation that does not require enforcement action, because monopolization attempts plant the seeds of their own destruction. When several companies enter into a cartel arrangement and agree to restrict supply or keep prices high, some of the cartel participants are always tempted to cheat. One of the colluding parties almost inevitably defects by selling more than its agreed-upon quota or selling at a lower price. And if someone doesn't defect, artificially high prices or restricted supplies create opportunities for new competitors to enter the market and undercut the cartel's monopoly price.

Predatory pricing occurs when a company intentionally sells a product at a loss in order to drive out competitors. Once it has the market to itself, it then raises the price of the product and reaps extra-high profits. This scheme never works in practice. The longer a company sells at a loss, the longer it has to keep an artificially high price later in order to make up its previous losses—giving competitors an opening to undercut them. As the Supreme Court pointed out in the 1986 case *Matsushita v. Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, no evidence of predatory pricing had ever been found in an antitrust case, and antitrust authorities should stop wasting time searching for it. Until now, they have restrained themselves. Congress should see to it that they maintain that restraint.

Similar arguments apply to other forms of alleged strategic predatory behavior.

Price discrimination is the practice of selling the same product to different customers at different prices. Examples of price discrimination include bulk discounts, seasonal and clearance sales, retailer coupons, discounts for seniors and veterans, and other common business practices that have long been familiar to consumers. These and other forms of price discrimination give companies an incentive to boost supplies, which puts downward pressure on prices. They also allow more consumers to buy products they want at terms they voluntarily accept.

Manufacturers often require retailers to sell their products at some minimum price. Because retailers cannot compete with each other on price with these products, they often compete in other areas, such as informative sales demonstrations, marketing, and prominent shelf placement. If the minimum price guarantees a high profit margin, some of it will go toward those other competitive practices, and the rest gives the retailer an incentive to sell as much as it can, benefiting the manufacturer. Meanwhile, consumers benefit from a product they might have not heard of otherwise.

Exclusive dealing is the practice of a manufacturer requiring a retailer selling its products to also agree not to sell its competitors' products. For example, most restaurants sell either Coca-Cola or Pepsi products, but not both.

Tying and bundling are related concepts. If a consumer buys one product, he must also buy another product. In antitrust cases, this often comes down to a word game, as it did in the Microsoft case. The controversy was over whether Internet Explorer was part of the Windows operating system or a separate product that was tied to it. Either way, Internet Explorer lost market share because consumers chose other web browsers—and then some newer and better browsers over those. Remember Netscape?

Technological lock-in is a valid concern, although antitrust enforcement is often a cause, not a remedy. The threat of enforcement can have a chilling effect on cost-cutting measures, such as mergers, new pricing models, and product innovations. Similar to cartels, locked-in technologies are always vulnerable to someone new entering the market with something better, as Microsoft learned the hard way with Internet Explorer. And if it stays on top, as QWERTY keyboards have, it is typically because consumers prefer them.

As the economy becomes more high-tech, specialized, and global, antitrust policies formulated in the smokestack era are becoming progressively less relevant. Aggressive antitrust enforcement can create considerable economic uncertainty, which can have a chilling effect on long-term investment and innovation in both products and business practices that can benefit consumers.

More antitrust enforcement means more business for lobbyists, as companies look for ways to avoid finding themselves in antitrust enforcers' crosshairs on the one hand, while lobbying for various types of corporate welfare on the other.

Antitrust regulation's biggest costs are hard to quantify because they are unseen, as they arise from the future innovation and attendant consumer benefit it prevents from occurring. Legislation to micromanage the business decisions of tech platforms, to apply antitrust regulations inconsistently based on market cap, and to do away with the consumer welfare standard will make American consumers worse off.

Bills such as the Online Innovation and Choice Act (H.R. 7030, S. 2992, 117th Congress), Open App Markets Act (H.R 7030, S. 2710, 117th Congress), and Prohibiting Anticompetitive Mergers Act all substitute the judgment of politicians, bureaucrats, and lawyers for what should remain private business decisions. Government officials do not have superior knowledge of markets, a crystal ball to see into the future, or a special enlightened impartial character that makes their judgment superior to those with skin in the game.

Antitrust law allows lawmakers to target private companies for reasons outside the proper scope of regulation, such as size or ideology. That is evident in recent proposals, such as the American Innovation and Choice Online Act (H.R. 3816, S. 2992, 117th Congress), that outlaw business activities only for companies of a certain type and above a certain market valuation. Regulations should apply broadly, not just to certain politically convenient targets. The American Innovation and Choice Online Act would, among other things, ban Amazon from self-preferencing its self-branded products, while allowing its brick-and-mortar competitors, such as Target, Walmart, and grocery stores, to continue self-preferencing their own self-branded products. The casualties of such proposals also include consumers and the rule of law. Such proposals do nothing to advance consumer welfare, but they allow politicians to score political points.

The consumer welfare standard has greatly improved the antitrust policy environment for U.S. businesses and consumers over the past four decades. It is the product of a long intellectual history dating back to the 1960s and most famously expressed in Robert Bork's influential 1978 book *The Antitrust Paradox*. In short, the consumer welfare standard holds that antitrust authorities should prioritize consumer welfare over other considerations, such as firm size or degree of market concentration, when evaluating whether to approve specific mergers or any other kind of business arrangement.

By the early 1980s, courts began applying the consumer welfare standard in their antitrust decisions, and it has largely guided antirust regulation ever since. Before the consumer welfare standard, enforcement was incoherent, uncertain, and vulnerable to changing direction with each change of administration or new intellectual fad.

Regulators' efforts to benefit less successful competitors often harm consumers. Worse, they often exacerbate the problems they were intended to solve, all while inviting political mischief. The current bipartisan movement to end the consumer welfare standard would harm U.S. consumers, businesses, and the country's global competitiveness and quickly move well beyond its current big-tech targets.

Experts: Jessica Melugin, Ryan Young, Alex Reinauer,
Iain Murray, Mario Loyola, Wayne Crews

For Further Reading

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Ryan Young and Wayne Crews, "The Case against Antitrust Law," *Issue Analysis* No. 1, Competitive Enterprise Institute, April 2019, https://cei.org/studies/the-case-against-antitrust-law/.

Mario Loyola, "The State Antitrust Paradox," *Issue Analysis* No. 2, Competitive Enterprise Institute, February 2022, https://cei.org/studies/the-state-antitrust-paradox/.