

Antitrust



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There is a global push to strengthen and broaden antitrust laws. American technology companies are the primary targets. In the US, this fight is happening simultaneously in state legislatures, federal agencies, and Congress. To ensure that smarter antitrust regulation prevails, 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; and
- Oppose efforts to expand antitrust policy.

Send it to DOJ: Congress should eliminate the present dual enforcement of the US antitrust laws and designate the Department of Justice as the sole antitrust enforcer. This would aid in the depoliticization of antitrust enforcement and guarantee a fairer process for private defendants.

The DOJ's Antitrust Division is required to file antitrust suits in federal court, where it must abide by the Federal Rules of Evidence and Federal Rules of Civil Procedure. Currently, the FTC adjudicates antitrust cases in its internal administrative law court where it acts as the prosecutor, judge, and jury. Furthermore, the FTC promulgates its own rules on how these adjudications takes place.

Eliminating the FTC's antitrust authority is not a new idea. In 1980, Stanford Law Professor William F. Baxter, who would eventually go on to head the DOJ's Antitrust Division, argued that the FTC should lose all antitrust authority. "I see no arguments whatsoever for preserving these two agencies. The FTC in my view has done a lousy job with its piece of the antitrust elephant," Baxter said.

In light of recent FTC overreach, the time for action has come. Congress should streamline antitrust enforcement into a single agency. The One Agency Act, introduced in both the 117th Congress (S. 633, H.R. 2926) and the 118th Congress (H.R. 7737) would accomplish this.

Scope of antitrust: The free market, driven by competition and consumer choice, is more effective at promoting prosperity than antitrust regulation, which often hinders innovation and is susceptible to political manipulation. History demonstrates that economic freedom, not government intervention, is the most powerful engine for societal good and individual empowerment. Antitrust regulators are shifting away from the consumer welfare standard towards a “big is bad” approach. This structural approach disregards consumers and instead attempts to expand antitrust beyond its traditional focus on consumers to encompass broader social and political goals.

With the 2023 Merger Guidelines finalized in December, the antitrust agencies have wasted no time in bringing lawsuits to test their application. The FTC’s challenge to the Kroger-Albertsons merger is the first big challenge to a horizontal merger under the new guidelines. The two grocers, who are merging for the purpose of being better equipped to compete with market leader Walmart, are at risk of having their merger scuttled by the Commission. If the FTC is successful, the combined firms’ potential to reduce prices for consumers would be cut off.

The vague language of the Sherman Act, the FTC Act, and the Clayton Act has allowed antitrust enforcement to become politicized, creating uncertainty for businesses. Congress should either define key terms more precisely or repeal them altogether. Ideally, Congress should remove the federal government from the merger review process entirely.

The Federal Trade Commission is also intent on reviving enforcement of the Robinson-Patman Act, a depression-era law that prohibits price discrimination with the purpose of protecting small businesses from being undercut by larger and more efficient retailers who can negotiate lower prices for their customers. In other words, Robinson-Patman enforcement is essentially a mandate to raise prices. It is an anti-consumer law. Congress should repeal the Robinson-Patman Act.

Don’t expand antitrust: Furthermore, Congress should refrain from passing legislation that expands the DOJ’s and FTC’s antitrust authority. Proposals like the American Innovation and Choice Online Act (S. 2033, 118th Congress) and the Advertising Middlemen Endangering Rigorous Internet Competition Accountability Act (S. 1073, 118th Congress) continue to be introduced in Congress and threaten the prosperity of the internet economy. These bills, as well as the Open App Markets Act (S. 2710, H.R. 7030, 117th Congress), attempt to micromanage markets to the detriment of consumers and small businesses.

Efforts to abandon the consumer welfare standard and expand the antitrust agencies’ authority would harm the nation’s economic health and make the problems they are trying to solve even worse. And these negative unintended consequences would extend far beyond its effects on America’s tech industry, one that leads the world in innovation and success.

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

For further reading:

Jessica Melugin, “The Changing Role of Structural Presumptions at the Federal Trade Commission,” Truth on the Market (blog), October 9, 2023, <https://truthonthemarket.com/2023/10/09/the-changing-role-of-structural-presumption-at-the-federal-trade-commission/>

Alex Reinauer and Ryan Young, “SNAP Back to Reality: Why the FTC Needs a Broader View of the Kroger-Albertsons Case,” National Review, March 13, 2024, <https://www.nationalreview.com/2024/03/snap-back-to-reality-why-the-ftc-needs-a-broader-view-of-the-kroger-albertsons-case/>

Jessica Melugin, “Silver Lining? New Federal Merger Guidelines: 11 Bad Ideas Instead of 13!,” Competitive Enterprise Institute, December 18, 2023, <https://cei.org/blog/silver-lining-new-federal-merger-guidelines-11-bad-ideas-instead-of-13/>

Alex Reinauer, “Lina Khan’s Tenure as FTC Chair Highlights Need for Reform of the Agency,” Competitive Enterprise Institute, March 22, 2024, <https://cei.org/blog/lina-khans-reign-as-ftc-chair-highlights-need-for-reform-of-the-agency/> Iain Murray, “AI Could Make the Google Court Decision Moot,” National Review, August 5, 2024, <https://www.nationalreview.com/corner/ai-could-make-the-google-court-decision-moot/>