

Antitrust Principles and Evidence-Based Antitrust Under the Consumer Welfare Standard
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Comments of the International Center for Law & Economics:

Since the original Pitofsky hearings at the dawn of the Internet era, much has fundamentally changed in the way the firms do businesses. Yet, despite these rapid and fundamental shifts in technology and behavior, we still face many of the same policy challenges as existed twenty-plus years ago. Innovation always yields both costs and benefits, meaning that some firms will face adverse effects as the environment in which they developed their business changes. Unfortunately, some antitrust observers use this reality as an opportunity to advocate for problematic changes in the underlying law.

Yet, in the face of these changes, time-tested antitrust principles become even more important, and the focus of enforcers and lawmakers should be in favor of maintaining and strengthening the existing consumer welfare standard. It is a standard rooted in testable, empirical realities, and is designed to lead to reproducible outcomes that redound to the benefit of consumers. These comments explore a number of important areas, including:

1. Competition and consumer protection issues in communication, information, and media technology networks;
2. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring “platform” businesses;
3. The intersection between privacy, big data, and competition;
4. The Commission’s remedial authority to deter unfair and deceptive conduct in privacy and data security matters; and
5. Evaluating the competitive effects of corporate acquisitions and mergers.

By combining lessons from the history of antitrust policy and contemporary economics, this analysis elucidates the key issues faced by the antitrust enforcers as they consider the future of antitrust policy. To date, no better alternative has been proposed, and enforcement agencies should tread lightly when considering alterations that would undermine the solid foundations of antitrust law. The unfortunate outcome of many calls to reform would be to return antitrust law to an era of politicized enforcement, lower consumer welfare, and greater uncertainty for firms operating in the economy.

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