

The Rise of Neo-Brandeisian Competition Policy and the Threat to Evidence-Based Regulation: (FTC Hearings, ICLE Comment 1)

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Comments of the International Center for Law & Economics:

In 1995, then-FTC-Chairman Pitofsky convened a set of hearings — the Global Competition and Innovation hearings (“Pitofsky Hearings”) — aimed at investigating the implications for antitrust law, economics, and policy of “increasing globalization and rapid innovation.”² As the Pitofsky Hearings report noted:

These changes create new possibilities and raise new problems for consumers, businesses, and government agencies. It is in everyone’s interest that government understand these developments in order to make sure that the marketplace continues to work competitively for businesses and consumers.

Two decades later — a near eternity in Internet time — the same changes are proceeding apace, and the need for greater understanding remains; arguably, it is even more acute today.

By the 1990s, the global marketplace had already grown dramatically, and technology startups were beginning to test new regulatory and legal fault lines. Today we face an even-more-tightly integrated world market, along with the intensification of international tariff disputes, the creative imposition of non-tariff trade barriers (including antitrust enforcement), and the increased brazenness of politicized industrial policy implementation that expanded global competition brings.

Meanwhile, several of the tech companies that were at most fledglings (if they existed at all) in 1995 have grown to become some of the most highly valued companies in the world. Their success — and the dramatic evolution of the world economy it has brought about — has engendered a new wave of hand wringing over firm size, industry structure, the social consequences of economic and technological change, and the proper role of antitrust and consumer protection law in addressing them.

Chairman Simon and the Commission should be commended for undertaking these hearings. Greater understanding of the antitrust and consumer protection implications of significant economic developments is always welcome. In particular, there remains much about the welfare implications of competition policy decisions surrounding innovation that we still don’t understand.

Yet, while some of the business, economic, and legal specifics are novel, important, and worthy of investigation, the core policy issues we face today are nothing new, and they weren't new even in the 1990s. The innovation that drives economic growth, while generally beneficial, nonetheless inevitably causes adverse effects for some businesses and/or the interests of some social commentators, and this has resulted in attempts to politicize antitrust in order to protect those businesses and/or social interests. What is troubling is how little we seem to remember of what we do know, even as slightly different versions of the same antitrust debates continue to recur.

Fundamentally, what we know is this: First, unless and until a demonstrably better alternative is offered (and none has been, either today or over the course of antitrust's 100-year history), the consumer welfare standard — warts and all — is the appropriate touchstone for antitrust enforcement and adjudication. Whether specific firm conduct or enforcement decisions promote consumer welfare is, of course, always up for discussion. But that antitrust law, enforcement decisions, and policy should not intentionally incorporate or be informed by inherently idiosyncratic and inevitably politicized public policy preferences is beyond doubt.

Second, competition and consumer protection policy should be economically grounded and evidence-based. Similarly, decisions regarding policy changes should be based on rigorous, economically robust, and constantly tested empirical knowledge. But it is insufficient to point to even well-supported empirical claims regarding aggregated market effects or specific case outcomes as the basis for (often-dramatic) policy prescriptions. Rather, decisions regarding competition and consumer protection policy must be undertaken with a robust understanding of the institutional structures and agency processes by which they are implemented.

Arguments abound that we should ratchet up antitrust and consumer protection enforcement in various ways in order to tackle hot-button issues like excessive concentration, insufficient privacy protection, fake-news, wealth inequality, and the like. But few of them rest on solid empirical evidence, and fewer still (if any) seriously address whether or how defects in policy and enforcement decisionmaking processes may have led to the claimed problems and whether or how altering those processes would correct them. Such arguments should not simply be ignored, but nor should they be taken seriously unless and until they are rigorously supported by economic, empirical, and institutional analysis.

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