

The Continued Viability and Flexibility of the Consumer Welfare Standard (FTC Hearings, ICLE Comment 6)

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Comments of the International Center for Law & Economics:

The consumer welfare standard (“CWS”) has been the subject of much discussion lately, largely driven by a seeming uptick in criticism of the standard. This criticism falls generally into two camps. On the one hand, the CWS is understood to be the broadly correct, if imperfect, touchstone for antitrust enforcement. Proponents of this view support the consumer-focused approach to antitrust but nevertheless often recognize the inherent shortcomings of the CWS (endemic to any general legal principle applied in complex and evolving economic circumstances), and particular areas where its operationalization can and should be improved (e.g. accounting for innovation harms or properly defining who counts as a “consumer”).

On the other hand, the CWS is objected to per se by some critics as an improper or incurably deficient guiding principle for antitrust enforcement. Proponents of this view see the CWS as inconsistent with the proper goals of antitrust, which should, they contend, focus on control of threats to the “process of competition” (as opposed to the welfare of consumers). Many of the adherents to this perspective also contend that antitrust should address private-sector economic threats to the democratic process more broadly. In both cases a key component of the antipathy to the CWS is that it has allowed for the sustained presence of large corporations in the polity — a presence that is alleged to threaten, simply by its existence, both competitive and democratic welfare.

Yet, as discussed in this comment, the CWS continues to be a vital component of modern antitrust analysis. Despite the characterization of its critics, the CWS is not a single tool which gauges all conduct with a simplistic price analysis. Rather, it is a methodology by which to arrange the array of legal and economic tools that guide antitrust enforcement and adjudication and to evaluate their efficacy.

For example, and as discussed at length in this comment, the CWS is completely capable of relying upon the tool of presumptions for certain modes of analysis. Yet presumptions are neither good nor bad per se, but are merely a single tool, the utility of which depends upon the method of use. When applied within the CWS framework, presumptions can serve procompetitive ends. By contrast, when employed to satisfy the ends of advocates who wish to impose hypothetical “ideal” structures on the economy, presumptions can be — and often are — destructive.

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