ICLE tl;dr

The Consumer Welfare Standard: Bringing Objectivity to Antitrust

February 2021

tl;dr

Background: In antitrust law, the Consumer Welfare Standard (CWS) directs courts to focus on the effects that challenged business practices have on consumers, rather than on alleged harms to specific competitors. Critics of the standard claim this focus on consumer welfare fails to capture a wide variety of harmful conduct. In addition to believing that harm to competitors is itself a valid concern, critics of the CWS believe it leads to harmful concentrations of political and economic power by biasing antitrust enforcement against intervention. Under this view, the CWS contributes to such harms as environmental degradation, income inequality, and bargaining disparities for labor.

But... Returning to a pre-CWS state of the law would lead antitrust enforcement to become confused, contradictory, and ineffective at promoting competition. The CWS makes antitrust economically coherent and democratically accountable.

However... The CWS is agnostic about how much antitrust enforcement is necessary. Indeed, many advocates of more vigorous antitrust enforcement are also defenders of the CWS. The standard uses objective economic analysis to identify actual harms and to recommend remedies when those harms are not outweighed by countervailing benefits to consumers. While the issues the CWS critics care about may be important, antitrust law is a bad way to address them.

KEY TAKEAWAYS

COMPETITION HAS TO HURT YOUR COMPETITORS

Prioritizing competitor welfare over consumer welfare, as Sen. Amy Klobuchar's antitrust bill would, means abandoning competition as the goal of antitrust. Businesses want a quiet life and large profits. If one firm outcompetes another with a better product or a lower price, it disadvantages that competitor by lowering its profits or forcing it to work harder to maintain them. The consumer ultimately wins in this struggle. Basing antitrust liability on conduct that "materially disadvantages" competitors would impose liability for the act of competing itself.

THE OLD MODEL OF ANTITRUST WAS INCOHERENT AND UNACCOUNTABLE

Before the rise of the CWS, antitrust enforcement was incoherent and lacked underlying neutral principles. In the words of Justice Potter Stewart, the only consistency was that "the government always wins." Competitive practices could be condemned

because they hurt the profitability of some businesses. Sometimes courts would worry that prices were *too low* and would therefore permit "price floors" to protect small business.

This lack of consistency led to a body of law that was contradictory and unpredictable, and that regularly undermined competition. By entrusting enforcement and antitrust policy to the discretion of unelected enforcement officials, competition policy was effectively removed from democratic oversight.

THE CWS GROUNDS ANTITRUST IN OBJECTIVE ECONOMICS AND TRACTABLE EVIDENCE

Adherence to the CWS renders antitrust judgments transparent and quantifiable by giving a clear benchmark for economic analysis. Without the CWS, courts might trade reduced competition and consumer welfare for a reduction in, for example, a business's political influence. While achieving the latter may (or may not) be a worthy goal, there is no objective way to assess trade-offs between the two priorities. The CWS requires testable claims and counterclaims as part of a competition case. It allows antitrust cases to focus on a question that can be answered objectively: "Is the challenged conduct likely to make consumers better or worse off?"

THE CWS CONSIDERS INNOVATION AND QUALITY, AS WELL AS PRICE

The CWS has always encompassed aspects of competition beyond price, including innovation, quality, and product variety. The CWS is thus fully compatible with markets where products are offered at a zero price to consumers, or where the alleged source of harm is the loss of innovation. *US v. Microsoft*, for example, hinged on an innovation theory of harm, as did the U.S. Justice Department's lawsuit against the Visa/Plaid merger, which led to the merger being abandoned. As in other supply markets, anticompetitive conduct by businesses in the labor market has been ruled illegal under the CWS and both of the federal antitrust agencies have brought cases against this kind of conduct.

THE CWS DOES NOT PRECLUDE INTERVENTIONIST ANTITRUST

Many defenders of the CWS—such as Yale economist Fiona Scott-Morton and Penn law professor Herbert Hovenkamp—also believe that antitrust enforcers ought to be more aggressive in challenging business conduct and mergers that they believe worsen competition and consumer welfare.

ANTITRUST IS NOT A PUBLIC POLICY SWISS ARMY KNIFE

Antitrust is a bad tool to achieve goals other than increased competition, because it is often impossible to objectively compare the value of different competing ends. Where difficult trade-offs must be made between competing social goals, such as balancing economic growth with the environment or workers' welfare, the legislative process is a better mechanism to weigh society's preferences than the judgement of a court. Trying to use antitrust to achieve these ends is often an attempt to bypass the democratic process when that process does not deliver the outcomes that advocates want.

For more on this issue, see ICLE's other work on the Consumer Welfare Standard.

CONTACT US

Sam Bowman
Director of Competition Policy
sbowman@laweconcenter.org

ICLE International Center for Law & Economics