ICLE tl;dr

Dystopia vs. Evidence-Based Policymaking

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Background: All around the world, policymakers are proposing legislative changes that would drastically alter the ways that online platforms can operate. Motivating these initiatives have been fears that, absent explicit regulation, digital markets would suffer from failures that could not later be remediated.

But... These putative reforms are *not* rooted in a rigorous assessment of the costs and benefits of regulatory intervention. In lieu of empirical evidence, lawmakers are relying on highly abstracted theories of potential harm whose bearing on real-world markets is uncertain. Policymakers should instead rely on the tried-and-tested Consumer Welfare Standard that has successfully guided U.S. antitrust enforcement for the better part of a century.

KEY TAKEAWAYS

DYSTOPIAN ANTITRUST

We define "antitrust dystopia" as the pessimistic tendency of competition scholars and some competition enforcers to presume that new and novel business conduct will have unprecedented anticompetitive effects. These presumptions persist despite the benign or positive consequences of many previous, similar technological advances. With each new advance, the warning again goes forth that "this time is different"; this time, those advances will have dire adverse consequences, absent enforcement to stave off abuse.

Dystopian fears of this sort hold great sway over contemporary policy relevant to digital markets. For instance, ongoing legislative initiatives, notably in the United States and the European Union, would prevent certain online platforms from favoring their own downstream services, or from tying ancillary services to their core products. They would also force platforms to share proprietary data with rivals and coerce them into opening up their platforms. The resulting regulatory paradigm treats dynamic online platforms as if they were public utilities.

These proposals assert that certain features of digital markets (notably, network effects and increasing returns to scale) make them inherently prone to failure. Proponents thus argue that only *ex ante* intervention can make online markets "contestable" and thereby ensure that incumbents do not exploit consumers and that innovation continues to progress. They also assert that preemptive regulation is necessary, because burgeoning rivals might be foreclosed or absorbed by the time authorities intervene *ex post*.

EVIDENCE-BASED POLICYMAKING AND THE CONSUMER WELFARE STANDARD

There are vast differences between evidence-based policy—guided by cost-benefit analysis or, in the case of antitrust law, by the

Consumer Welfare Standard—and public intervention based on the mere possibility of harm. Unfortunately, it is mostly the latter guiding today's proposed digital market regulations..

As of yet, there is scant evidence to suggest that commonly decried practices *generally* prevent the emergence of more efficient rivals. This includes self-preferencing, tying, refusing to share data with rivals, or deciding to limit a platform's interoperability.

There is also no evidence that barriers to entry have made or are making online markets non-contestable. To the contrary, anecdotal evidence—most recently, the rapid emergence of TikTok, challenging established incumbents like Instagram and YouTube—suggests the opposite may be true.

When confronted with the inconvenient fact that online markets have prospered over the last decade, critics will often retort that things "might be better." But this is the epitome of dystopian policymaking. Of course, outcomes *might* be better. They also might be worse, just as regulation might exacerbate any failures that currently exist.

THE EVIDENCE-BASED PATH FORWARD

None of this is to say that public intervention is always misguided. However, absent solid evidence that regulation would, on balance, produce superior outcomes for consumers, the only responsible course is to continue to proceed on a case-by-case basis. This approach enables authorities to infer appropriate rules and, if necessary, create presumptions that certain categories of conduct generally harm consumers.

Critics retort that this process is slow and places an insurmountable burden on authorities. But here, they mistake cause and effect. Indeed, these difficulties are merely a function of the speculative theories of harm authorities have routinely deployed in the past.

In other words, the "obstacles" to intervention are a desirable feature of the system, shielding firms from the idiosyncratic whims of regulators. Put differently, why should we categorically proscribe an entire category of conduct if authorities cannot even show its negative welfare effects on a case-by-case basis?

The upshot is that policymaking should always be guided by the best available evidence, and mindful of the limits of public intervention. When aggregate evidence is lacking, it is necessary to proceed at a more granular level. Unfortunately, as things stand, policymakers are wandering in the dark, guided only by blind faith that what they are doing is righteous. This is a terrible way to design policy.

For more on this issue, see Geoffrey Manne and Dirk Auer's *George Mason Law Review* article, "Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins," and the accompanying *Truth on the Market* blog post. See also ICLE's prior explainer on the Consumer Welfare Standard.

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