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NetChoice

Opposing Calls to Upend Antitrust Law and Supporting the Existing Consumer Welfare Standard

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Dear Senator,

The 51st Congress passed our Nation's first antitrust law—the Sherman Act—in 1890. That law enshrined our "national values of free enterprise and economic competition," and has long been "a central safeguard for the Nation's free market structures."[1] It established "'protecting consumers from monopoly prices' [as] 'the central concern of antitrust.'"[2] Since 1890, Congress has tweaked that law a few times.[3]

But today, some want to upend the law so radically that rather than protect competition for consumers' sake, it'll protect competitors for competitors' sake.

That is the wrong approach, and Congress should reject it.

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Antitrust enforcement is an extraordinary remedy for an extraordinary problem. Given the stakes, there is simply no justification for lawmakers to weaken or overturn the consumer welfare standard, which reflects decades of accumulated wisdom.

First and most important, the consumer welfare standard focuses antitrust analysis on one group: American consumers. Instead of forcing judges to "balance" competing and contradictory interests—a task so inherently subjective it undermines the rule of law—the consumer welfare approach stresses objective study of a business practice's effects on consumers. While this lens necessarily excludes other groups, it is consistent with *antitrust* law. Not every social, economic, or political issue is appropriate for antitrust enforcement.

Second, the consumer welfare standard supports the rule of law by limiting arbitrary enforcement decisions. Unlike other countries that anchor their competition policies in an "abuse-of-dominance" standard, which often emphasizes a business's "size," the United States prioritizes innovation regardless of size. In other words, whereas the European Union may worry more about a business growing its market share above 30%, the United States worries more about depriving American consumers of innovative products because of subjective concerns about a business's relative size.

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[1] *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1110 (2015) (internal citation omitted).
[2] *Apple, Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (citation omitted).
[3] For example, Congress passed the Clayton Antitrust Act and the Federal Trade Commission Act in 1914, the Robinson–Patman Act in 1936, and the Celler–Kefauver Act in 1950.

Because the American approach focuses on *effects*, not size, it supports the rule of law: Only when businesses harm consumers do they run afoul of the law. In Europe, however, businesses must pay greater attention to regulators' idiosyncratic views—will they deem us too big? It also encourages businesses to subvert antitrust laws into a cudgel to hurt their rivals.

The consumer welfare standard, by contrast, marginalizes politics and emphasizes empirical evidence. In other words, the law is violated only when evidence shows a firm harmed consumers, not when an enforcer merely declares that the firm is too big or went too far. In fact, when the law is subjective like that, enforcers can extract concessions—appropriate or not—from businesses eager to be seen as cooperative, lest they increase the target on their back. Should the United States abandon the consumer welfare approach to antitrust and adopt principles from abroad, businesses will likely feel compelled to act in ways that they believe the Federal Trade Commission's or Department of Justice's enforcers will like.

That would be a disaster. Consider current politics over content moderation on the internet. To many Republicans, platforms remove too much content; to most Democrats, platforms remove too little content. Depending on which party controls the FTC or DOJ, politics about content moderation could bleed into antitrust enforcement. To cite one hypothetical: the FTC could block a Parler and TRUTH Social merger on the grounds that their relatively hands-off approach to moderation would result in too much "misinformation" online.

In sum, abandoning, weakening, marginalizing, or otherwise demoting the consumer welfare standard's role in antitrust enforcement would be a costly mistake that jeopardizes American tech dominance and innovation, raises prices and lowers quality, stifles innovation and punishes success. Even worse, American consumers would pay the price.

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While we do not agree with calls to overhaul the country's antitrust regime, we caution against interpreting that as rigid support for the status quo. To the contrary, the consumer welfare standard is objective—its greatest strength—but it is also flexible.

It tells enforcers who to protect, but it leaves them and the courts free to develop and refine new antitrust doctrines rooted in empirical studies and economic literature in support of that effort. For that reason, we encourage Congress and enforcers to shift gears from trying to radically overhaul the law to working within the law's flexible—but objective—doctrines.

Sincerely,

Steve DelBianco
President & CEO
NetChoice

NetChoice is a trade association that works to make the internet safe for free enterprise and free expression.