

A NEW STANDARD FOR ANTITRUST

THE EFFECTIVE COMPETITION STANDARD: IN PRACTICE

ISSUE BRIEF BY **MARSHALL STEINBAUM AND MAURICE E. STUCKE** | SEPTEMBER 2018

Today's economy has a market power problem. Consumers are paying higher prices; new entrants face tougher barriers; workers have little power to demand competitive wages and benefits and less mobility to leave for a better offer; and suppliers often can't reach the market without paying powerful intermediaries for the privilege. The available economic data all point to declining competition, increasing concentration, less innovation, and widening wealth and income inequality.

There are many drivers of our market power problem. One significant factor is weak antitrust law and enforcement. Over the past 35 years, Americans have paid the price for a "consumer welfare" standard, which the courts created and interpreted in ways that neither benefit consumers nor their welfare. After nearly four decades, no consensus exists on what the consumer welfare standard actually means. While it is intended to prevent monopolies from charging higher prices, it has failed even on this measure, as the empirical evidence reveals. Moreover, the consumer welfare standard ignores vast segments of the economy, including the adverse effects of mergers, powerful buyers, and unilateral restraints on upstream suppliers and workers. With such price-centric tools, the U.S. competition agencies often cannot assess how mergers and restraints will impact what is increasingly important in the 21st century economy, namely quality, privacy, and innovation. Exacerbating the shortcomings of this "consumer welfare" standard is the courts' unwieldy, case-by-case rule-of-reason analysis, which is too costly and time-consuming for anyone other than a well-financed plaintiff to undertake. The inability to bring and win antitrust cases, in turn, allows market power to fester and accumulate unchallenged, and exploitative and predatory business models that were once illegal have since become legal.

Under the current antitrust regime, our market power problem will likely worsen. Nor will the Supreme Court likely reorient antitrust to its original purpose. Thus, a new standard is needed to restore competition. We propose the effective competition standard as an alternative that would revive the original aims of antitrust law—to preserve competitive market structures. **Under the effective competition standard:**



“Agencies and courts shall use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power as the principal objective of the federal antitrust laws.”

In practice, the new effective competition standard restores the proper focus on market structures; expands the stakeholders that should be taken into account when assessing anticompetitive harms to include all those who are, in fact, harmed by anticompetitive conduct; appropriately recognizes that competition needs competitors; and returns antitrust law to its proper role in dispersing private power.

There are a number of ways to implement this new standard. First, we recommend that Congress codify the above principles, in order to assure that courts construe the antitrust laws in ways that protect the interests of the majority, rather than the interests of powerful firms, and circumscribe courts from arbitrarily reaching standards or results that contribute to the market power problem.

In addition, we recommend a series of specific changes to the Sherman and Clayton Acts. As a result, courts would rely far less on the Supreme Court’s rule-of-reason framework and far more on simpler legal presumptions and rules that lawyers can easily explain to their clients—and that impose greater accountability on the courts and agencies. This includes creating stronger presumptions in merger review to prevent dominant firms from acquiring rivals and mergers in concentrated markets, as well as tougher positions on monopolies and monopsonies. No longer can the Supreme Court, under its consumer welfare standard, condone monopolies charging high prices as “an important element of the free-market system,” especially when this is inconsistent with our social, moral, and political values and contrary to the economic evidence. The effective competition standard will reorient courts and enforcers to look more often upstream, protecting the right of market access and casting a skeptical eye on vertical restraints. To that end, we propose the following specific legislative changes:

ESTABLISH A NEW, CLEARER SET OF INDICES FOR DETERMINING WHETHER A FIRM HAS MARKET POWER

Current law requires plaintiffs or enforcement agencies to prove that there is high concentration in a narrowly defined market prior to showing anticompetitive behavior or demonstrating that a proposed merger would cause harm. In *Ohio v. American Express*, the Supreme Court required the plaintiffs to prove the defendant’s market power by showing



concentration, which is circumstantial evidence of market power at best, when direct evidence of market power was available. Now private plaintiffs and enforcement agencies in cases involving vertical restraints will have to define a relevant market, often a costly, time-consuming endeavor, using antitrust's price-centric tools, and then calculate the defendant's market share in that market, then show that the market share is high enough to infer the defendant's market power, even when plaintiffs have strong evidence of the restraint's anticompetitive effects.

This circumvents legal standards and economics. Rather than one sole criterion for market power—a high market share in an antitrust market—antitrust law should allow plaintiffs to offer direct and circumstantial evidence of market power, including observable direct indicia of market power on which anticompetitive claims may be premised. As many scholars have argued, high market shares are dispositive neither in favor of nor against market power, and therefore a broader range of indicia are necessary. Indeed, as the economic evidence reflects, firms with low market shares nonetheless can at times exercise significant market power upstream against suppliers and workers. These indicia should include:

- The unilateral ability to set prices or wages, or to charge prices in excess of the competitive level;
- The ability to price or wage discriminate;
- The ability to impose disadvantageous non-price contractual terms on counterparties or revise contractual terms in one's own favor;
- The ability to exclude competitors; and
- Profits or payouts to shareholders in excess of a firm's cost of capital for an extended period of time.

UPDATE MONOPOLIZATION/MONOPSONIZATION POLICY AND ANTICOMPETITIVE, UNILATERAL CONDUCT BY A FIRM UNDER SECTION 2 OF THE SHERMAN ACT

Under the Supreme Court's current consumer welfare standard, monopolies have little to fear, as the Court has significantly limited their potential liability for their anticompetitive actions. Predatory pricing cases have all but disappeared. Courts now opine that monopolies have no duty to deal. And for all of these anticompetitive actions, courts must entertain "efficiency" defenses—as though any illegal act might be rectified by some larger benefit to



society, a standard that exists in no other area of law. In this landscape, it is unsurprising that the Department of Justice (DOJ) has brought only one monopolization case since 1999. (In contrast, the DOJ, between 1970 and 1972, brought 39 civil and 3 criminal cases against monopolies and oligopolies.)

We recommend the following new test for determining when a firm engages in illegal anticompetitive conduct unilaterally under the effective competition standard. Namely, the plaintiff must show that:

- First, the defendant has, and exercises, significant market power, in accordance with one of more of the indicia outlined above;
- Second, this power excludes some potential competition and/or limits or has limited some actual competition; and
- Third, this power is not attributable solely to a defendant's ability, economies of scale, research, or natural advantages.

Next, as part of streamlining enforcement against unilateral conduct, the effective competition standard entails establishing certain actions as presumptive violations of Section 2 of the Sherman Act, including:

- Otherwise unlawful conduct that helps a firm attain or maintain monopoly or monopsony power;
- Predatory pricing below marginal cost for an extended period of time, for the purpose of excluding competitors and preserving market power, without the need for plaintiffs to prove "recoupment."
- Simpler standards for assessing when refusals to deal and exclusive dealing are illegal, including when they violate suppliers' right of market access.
- "Cheap exclusion," or actions on the part of a dominant firm that cost little, that are intended to exclude, disadvantage, or discriminate against competitors within its market, and that do not improve efficiency.

To make clear that a range of harms are to be considered when a firm engages in price discrimination, we additionally recommend amending Section 2 of the Clayton Act to prohibit price discrimination where it hurts consumers overall, as is the concern when a firm tracks individuals' spending patterns, collects personal data, and targets them in ways to get them to buy things they otherwise did not want, at the highest price they are willing to pay. Alternatively, Congress could consider limiting customer data collection in the first place.



MERGER POLICY UNDER SECTION 7 OF THE CLAYTON ACT

Antitrust laws generally are intended to prevent harmful accumulations of market power from forming in the first place. Under current merger policy, however, the burden is on enforcers to make the case that merging firms are likely to lessen competition (namely through higher prices), resulting in lax merger review and unchallenged large-scale acquisitions. Congress should adopt the following amendments to Section 7 of the Clayton Act to establish a tougher merger review process:

- Rather than placing the burden on the plaintiffs, the burden would shift to parties seeking to merge in ways that would either a) significantly increase concentration levels or b) be undertaken by firms that already hold significant market power—as demonstrated through the indices outlined above. The merging parties would have to prove that their proposed acquisition will not materially lessen competition, create a monopoly or monopsony, or help maintain their market power.
- Courts should be required to take all potential competitive outcomes of a merger into account, not just prices for consumers, including whether an acquisition will harm quality, choice, innovation, and privacy. That review must examine upstream effects on workers and suppliers and downstream effects on customers and others who could be harmed, and it must not assume that market power exercised upstream would result in “efficiencies” downstream or could be offset by them.

For proposed mergers that combine firms from different levels of the supply chain (i.e., manufacturer and distributor)—known as vertical mergers—Congress should prohibit such mergers when they could foster the firm’s ability and incentive to distort competition.

AGREEMENTS BETWEEN OR AMONG PARTIES UNDER SECTION 1 OF THE SHERMAN ACT

Congress should update laws that govern agreements between or among parties under Section 1 of the Sherman Act, including restrictions on the behavior of two parties at different segments of a supply chain—known as vertical restraints—such as resale price maintenance, territorial and other non-price restraints, and non-compete clauses and other provisions restricting workers’ rights in labor contracts. This should include:



- Clarifying that federal antitrust law covers both inter- and intra-brand competition; that is, competition both within and between supplier-distributor networks, such as franchises;
- Specifying that price and non-price vertical restraints are illegal, including in the labor market, other than in narrow circumstances when no party to them possesses market power and the restraints are necessary to foster innovation and competition; and
- Further clarifying that attempts to engage unlawful conduct (such as collusion), in addition to the conduct itself, are prohibited.

CONCLUSION

To address today's market power crisis, it is crucial that we restore and revitalize America's antitrust system. While insufficient alone to deconcentrate power in the economy—we must also increase sectoral regulation, build countervailing power among a broad set of stakeholders, and establish a robust public sector capable of meeting society's economic needs beyond the realm of profit and private advantage—the changes outlined above would substantially reverse rising concentration and establish principles by which economic power is truly democratized. With increasing concern across the political spectrum over today's monopolies (or data-opolies), this is an opportune time. The aim is clear: Effective antitrust is vital to promote an economy that's inclusive, to protect the privacy interests of citizens, to advance shared economic well-being, and to foster a healthy democracy. A new competition standard adds to a much-needed progressive blueprint for a robust 21st century antitrust regime.

For more information, see [*The Effective Competition Standard*](#) by Marshall Steinbaum and Maurice E. Stucke.



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