



# THE ROLE & RESPONSIBILITY OF ANTITRUST

There is a debate over antitrust policy and the appropriate level of enforcement. The **Chamber believes strongly in market competition, over government regulation**. For this reason we support antitrust enforcement when it seeks to protect or restore competition in the market in the economic interest of consumers, as opposed to advancing amorphous, and even conflicting, policy goals that have little to do with competition.

The Chamber welcomes a debate over the appropriate level of enforcement. We give antitrust enforcers a wide birth even as antitrust enforcement has had numerous examples of misguided enforcement actions. This is because **antitrust enforcement, when done correctly, is fact-specific and impacts a limited number of culpable economic players**, not an entire industry. Further, in its more than 100 year history, antitrust mistakes have been overcome with a deeper understanding of economics, without the need for constant course corrections from changes in the statutes.

The fact-based and economically grounded consumer welfare standard currently implemented by U.S. courts and enforcers has proven to be an effective tool in applying the antitrust laws and rejects the standards applied prior to the mid-1970's that were based on vague, subjective political and policy goals that second guessed the market and ignored consumer benefits. Moreover, over the years we have seen that **the antitrust laws and the consumer welfare standard are sufficiently flexible** to evaluate new economic theories of harm, including today's digital economy.

However, today too many voices – often with a radical view of antitrust and a broader policy agenda – are trying to move the debate from whether the antitrust laws are being adequately enforced to a troubling notion that the antitrust laws need to be updated. **The Chamber strongly opposes statutory changes, because we believe suggested changes are based on inherently flawed theories, reject decades of bi-partisan consensus, and present a whole host of potential dangers to our economy**, including hampering innovation, politicizing antitrust, and interfering with U.S. companies' ability to compete with Europe, China and the rest of the world.

At a fundamental level it is important to evaluate the current antitrust policy and enforcement debates, as well as potential changes in law, by asking oneself what antitrust is and is not.

## Antitrust IS about economic liberty

The economic success of the United States is built on the fact that the market, not the government, maximizes economic efficiency for the benefit of consumers. Antitrust therefore relies on competitive forces to police the market, and avoids picking winners and losers, and only acts to ensure competitive conditions. It is not a form of regulation designed to deliver a particular outcome in the market.

## Antitrust IS NOT a tool for political change

Concerns over jobs, speech, income inequality, corporate political power, and other social interests, are political conversations, not antitrust matters. Antitrust does not play a role, nor do we really want antitrust playing a role. Antitrust can protect competitive markets, but it is not designed to address the concerns above. Instead, we should look to legislatures to pass separate laws that specifically address these concerns.

## Antitrust IS about protecting competition and consumers

Consumers are the sole concern of antitrust. Consumers win when there is robust competition in the market. When alleged anti-competitive activity is linked to price going up, or output going down without any counter weighting pro-competitive benefit the economics are very straight forward. Antitrust analysis is also well suited to evaluating other forms of non-price competition such as quality, innovation, or consumer choice. Though some have claimed that antitrust is too focused on price and output, a long history of antitrust enforcement involving various forms of non-price competition shows otherwise.

## Antitrust IS NOT about fairness or competitors

“Fairness” is not a legal standard. What is fair can often be highly subjective. The role of economic analysis and the consumer welfare standard in antitrust are central to making enforcement decision as objective as possible. For this reason competitor’s complaints of “unfairness” are met with skepticism by antitrust enforcers for good reason. Inefficient competitors often attempt to seek protection from a more efficient competitor rather than competing on the merits. Where competitor complaints are turned away by enforcers, those competitors have often sought a political audience or friendlier foreign jurisdictions that conflate these complaints with market failure or seek to use antitrust enforcement as a tool for industrial policy.

## Antitrust IS highly technical

Antitrust cannot be divorced from sound economic analysis. Economics is a highly technical trade that is not easily suited to the amateur enthusiast. Theories of competitive harm rise and fall on supporting economic analysis, which requires careful analysis of the market, reams of discovery, and a careful type of cost-benefit analysis, commonly known as the rule of reason. Just because one can point to an anti-competitive harm, doesn’t mean there are not pro-competitive justifications that outweigh that harm. Economic analysis weighs these factors and only where the harms clearly outweighs the benefits does an enforcer feel the need to act.

## Antitrust IS NOT political

Antitrust is not well-suited for armchair quarterbacking, rooting for the underdog, or speaking in 30 second sound bites. It is a form of law enforcement and should be conducted in a highly professional manner with due process. Sadly, efforts to politicize antitrust efforts are all too common in foreign jurisdictions. The U.S. has had a long and proud history of largely steering clear from efforts to politicize enforcement. This tradition is well worth keeping.

## Antitrust IS highly fact-specific and evidence driven (rule of reason)

Some antitrust cases can be close calls, economic analysis might not always produce a clear answer, and judgements will need to be made. This is why we have courts. Just because some cases one may or may not agree with, one should not abandon the role of economics or circumvent the rule of reason.

For the same reasons, big is not necessarily bad. Antitrust does not punish those that build a successful business – even a monopoly – through competition on the merits. Otherwise, antitrust would undermine incentives for companies to compete hard and strive for success and deny consumers the benefits of competition. Only when big companies engage in exclusionary practices that are not deemed competition on the merits – like tying or exclusive dealing – and the pro-competitive benefits of their conduct does not outweigh the harm, can they be subject to antitrust enforcement.

## Antitrust IS NOT about setting bright line tests (per se)

Over the past forty years, courts and antitrust enforcers have rejected the bright line and per se unlawful tests applied in the early days of antitrust enforcement. They have done so because economic tools and theories have advanced and courts and enforcers have realized that these bright

line tests, while potentially easier to apply, harm consumers. Antitrust, appropriately as a law enforcement function, places the burden on the government to prove its case, to shift the burden suggests the government has insufficient evidence to bring a case. Yet some argue for changes to the antitrust law that would essentially undermine the rule of reason and the role of economics, shifting to a more per se or rules based approach to antitrust. Equally as bad are those voices that call for the burden to be shifted to the targets of an investigation to prove their merger or conduct is pro-competitive. Such approaches are nothing short of economic regulation and repeat the mistakes of the past – imposing bright line tests that harm consumers.

## Antitrust IS flexible

Antitrust learns from its mistakes, it adjusts based on deeper economic understandings. As the economics behind any given market becomes better understood conduct maybe viewed overtime as pro-competitive or anti-competitive. Changes to antitrust law would stunt the growth of this evolution and lock our economy into an economic straight jacket that overtime will undermine U.S. competitiveness, which is at the core of our dynamic economy.

One popular misconception is that antitrust is not capable of dealing with changes in the economy. The fact is antitrust enforcement is flexible because it is underpinned by the role of economic analysis and the rule of reason. As disruption in the economy gives rise to new sectors, economic analysis and a weighing of pro vs anti-competitive effects provides antitrust enforcers the tools to enforce the law today and tomorrow.

## Antitrust IS NOT outdated

Antitrust is governed by economics and the rule of reason and remains flexible enough to adapt to our digital economy, all while avoiding the temptation for abuse by those who would use it to benefit other interests. Antitrust has made many mistakes in its 100+ years, we should learn from, not repeat our history. The heavy handed nature of the pre-1970’s enforcement era is something that, while unfortunate, was short lived. During this time antitrust enforcers by-passed the economics, thought that they knew best and used the antitrust laws to shape our economy. Thankfully, with time, the courts recognized the short coming of the approach. Much of what underpins today’s call for changes in the law would return us to this misguided era of enforcement. If we allow the antitrust laws to be revised, as some suggest, this will endorse economic regulation over competition, and ultimately harm American consumers.