



Insight

What is the Future of Antitrust and Calls to Break Up Big Tech?

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Executive Summary

- A number of antitrust investigations continue into tech companies, despite a lack of evidence that antitrust violations have taken place and indications that the investigations are motivated by policy concerns separate from competition.
- Policymakers should consider market concentration in a broader context when it comes to technology, including by examining the many facets of competition and if there is an impact of such concentration, rather than presuming it to be a per se cause of antitrust action.
- Antitrust is not designed to address non-competition related policy concerns and policymakers should not use it as a political tool; instead, policymakers should continue to apply the consumer welfare standard to protect consumers while encouraging a dynamic market .

Introduction

Antitrust investigations by state attorneys general against Google and Facebook [continue](#), as does a probe by the [House Judiciary Committee](#) into potential antitrust violations by large tech companies. Additionally, [the Department of Justice](#) and [Federal Trade Commission](#) are also involved in antitrust investigations regarding several large tech companies. But it is still questionable if any antitrust violations have occurred. More important, however, antitrust law is not the right tool to address policy concerns outside of competition issues.

Antitrust Law and the Current Investigations

Antitrust law was originally developed in an era when the concerns were about monopolies and big businesses in industries such as steel, oil, and railroads. Certain practices, such as price-fixing and collusion, are considered per se illegal, while others require closer examination to be considered anti-competitive. Originally, the “rule of reason” [left much of the decision](#) over what constituted an antitrust violation to a judge’s discretion. This lack of a precise definition allowed decisions based on various policy reasons, resulting in uncertainty for businesses about what type of practices were considered unlawful. Beginning largely in the 1970s, courts shifted to a consumer welfare standard that looked at whether the current market structure (or proposed changes to market after a merger) was beneficial to the consumers. While this standard still allows for much debate over the definition of the market and many other factors, it has provided an objective standard that is [adaptable in many different industries](#), including technology.

Over the last few years, policymakers and critics have questioned whether large tech companies such as Google, Apple, Amazon, and Facebook were now monopolies that should be subject to antitrust scrutiny. What started as criticism and calls for breaking up “Big Tech” has now led to antitrust investigations and inquiries from both state and federal officials.

The exact reason for these concerns has varied. Some of the criticism of Big Tech has been directed at such companies' acquisition of other, often smaller companies, such as [Facebook's acquisition of Instagram](#), and claims that these giants stomp out potential competitors before they can develop. There are, however, [many legitimate reasons](#) such acquisitions may occur that are free from anti-competitive animus. In other cases, the claims have been related to the dominance and success of the companies in online spaces and the additional advantages it might bring, such as [Texas Attorney General Ken Paxton's comments](#) about Google's ad products. But such a critique ignores the complicated facets of the advertising market and the [many competitors](#) both digital and analog that exist. Finally, some critics of tech companies argue that these companies use data obtained through those using their platforms to unfairly quash competition by creating private-label version of similar products. But as the Progressive Policy Institute's [Alec Stapp points out](#), such private labels have long been developed by retailers based on consumer demand and often are preferred by consumers for their lower prices. Today's online retail market faces far more competitors around such goods.

In short, there are legitimate, competitive reasons Big Tech may be engaging in the behaviors that critics claim violates antitrust laws.

Applying the Consumer Welfare Standard

Competition is an important element of a free market, but antitrust law should not backslide from its objective standards based on policymakers' preference or distaste for a specific industry. Policymakers should continue to embrace the consumer welfare standard and not ignore what we have learned about the benefits of technology to consumers.

During the pandemic, the benefits of technology to consumers have become perhaps more apparent than ever. In fact, in [one survey](#) 9 out of 10 Americans expressed that they had a better appreciation for technology now. The technology market continues to change and respond to consumer demands in innovative ways from both new and existing players. Most of these changes have occurred with no cost to consumers. As a result, it is unclear [what harm](#) from a traditional, economic-focused antitrust analysis consumers might be facing. Consumers continue to receive better services either for free or lower prices. For example, in some cases companies have been able to make previously premium options, such as [encrypted messaging](#) or [video conferencing](#), available for free to consumers. As a result, consumers find themselves having more choices at lower prices for a wide range of information services.

Some critics do not deny the benefits of technology but instead have expressed concerns that there is too much concentration in the technology sector and that this concentration necessitates intervention for innovation to continue to flourish. But as the Information Technology and Innovation Foundation's [Joe Kennedy points out](#), these metrics may lump together companies that are in separate markets or focus on a national level while missing local competition. Even where there is concentration, it may not be a competition problem necessitating antitrust intervention. As Kennedy writes, "The link between market concentration and competition is ambiguous: In some cases, concentration can lead to a decline in competition, while in others, increases in concentration may reflect an increase in competition." Policymakers should carefully consider why concentration is occurring and what its impact is rather than presuming it requires intervention.

Pitfalls of Using Antitrust for Purposes Other than Competition

As other concerns about technology such as online speech and privacy gain renewed attention, policymakers should remember that antitrust is not a tool designed to solve other policy problems. Antitrust should remain

focused on the competitiveness of the marketplace.

As [Senate Judiciary Antitrust Subcommittee Chairman Mike Lee wrote](#) in response to criticism that he was not using his subcommittee's powers to investigate content decisions by Google, "[O]ur nation's antitrust laws, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, were not designed, nor are they equipped, to regulate political bias in technology or media companies." Not only would a breakup of Big Tech fail to solve concerns about content moderation, but using the law for such a purpose would be inconsistent with its purpose and could allow a future where antitrust could be weaponized for any number of policy reasons. This shift would return to the uncertainty of the era prior to the consumer welfare standard. Moreover, even if efforts to break up the biggest companies are successful, there is no guarantee that smaller companies would be more privacy sensitive or engage in different content moderation strategies. In fact, with more limited resources and less efficient options, these problems [might even increase](#).

If antitrust standards shift, policymakers should be concerned about how it could be abused and how that risk might impact entrepreneurs and innovators. For example, [recent testimony by whistleblowers claims](#) that the Department of Justice conducted antitrust investigations into the merger of small cannabis firms and the emissions agreement between California and four automakers for political motives. Changing the standard to allow for policy considerations would make such abuse of antitrust far more plausible and could dampen increased competition rather than encourage it. Such a shift would allow for rapid swings in the use of competition law, creating uncertainty for innovators and potentially depriving consumers of beneficial mergers or expansions.

Conclusion

Technology has proven to be an incredibly dynamic field with rapid changes, and especially during the pandemic consumers have benefited immensely from technology. Many still view technology companies with suspicion, however, indicating the "techlash" is far from over. Some policymakers and tech critics continue to see antitrust as a one-size-fits-all tool to solve any number of concerns, even though this area of law was designed for a very specific purpose. Shifting away from the consumer welfare standard would generate any number of issues, resulting in confusion for companies and deterring choices that might be beneficial to consumers. Attempting to use antitrust for anything other than competition-related concerns may make the underlying problems worse and allow for future abuse of this powerful area of law.