



Breathing New Life Into The Consumer Welfare Standard: The Protecting Competition Standard®

**Professor Carl Shapiro
University of California at Berkeley
1 November 2018**

See Carl Shapiro “The Consumer Welfare Standard in Antitrust,”
Testimony Before the Senate Judiciary Committee, December 2017,
<http://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf>





The Protecting Competition Standard[®]

[The Consumer Welfare Standard Done Right With Better Name]

A business practice is judged to be anti-competitive if it harms trading parties on the other side of the market as a result of disrupting the competitive process.

- **In many cases, those “trading parties” are consumers.**
- **In other cases, those “trading parties” are business customers.**
- **In some cases, those trading parties” are suppliers, such as farmers or workers.**



Protecting Competition: The Sole Goal of Antitrust Law & Policy

Protecting Competition Means Safeguarding the Competitive Process

- Antitrust Accepts the Outcomes Resulting from Legitimate Competition
- Sector-Specific Regulation Needed if Outcomes Are Seen as Unacceptable

Effective Competition in Turn Promotes Some Social Goals

- Reducing Corruption; Reducing Inequality; Economic Growth

Effective Competition May or May Not Promote Other Social Goals

- Preserving Small & Local Businesses; Clean Environment; Worker Safety



Structuring the Antitrust Inquiry

Ask Whether Harm to Trading Parties Has Resulted From a Challenged Practice that Disrupts the Competitive Process

- **Protecting Competition, Not Competitors**
- **Protecting Competition Does Not Mean “Big is Bad”**

Gives Coherence to Antitrust Law & Economics

- **Many Business Practices Commonly Harm Rivals By Putting Them Under Additional Competitive Pressure Without Disrupting the Competitive Process**
- **Example: Introducing New and Improved Products**



Examining Impact on Trading Parties Helps Distinguish Bad from Good

Horizontal and Vertical Agreements

- **Horizontal: Price Fixing vs. Standard Setting**
- **Vertical: Inter-Brand Exclusion vs. Intra-Brand Distribution Strategy**

Horizontal Mergers

- **Loss of Head-to-Head Competition vs. Synergies**

Unilateral Conduct

- **Boundary Between Predatory Pricing and Aggressive Pricing**



Attacks on the Consumer Welfare Standard

Some Criticisms Are Simply Based on Misconceptions

- **NOT Just About Price: All Impacts on Trading Parties Count**
- **NOT Just About Short-Run: Innovation & Long-Run Count**
- **NOT Ignoring Suppliers: All Trading Parties Count**

Some Criticisms Relate to Excessive Burdens of Proof on Plaintiffs

- **Presumptions and Burdens Can and Should Be Adjusted Using the Protecting Competition Standard[®]**

Some Populist Attacks Simply Miss the Mark

- **Suggestion That Virtually All Antitrust Lawyers and Economists Have Been Hypnotized or Blinded by Robert Bork is Nonsense**



Do Not Confuse the Protecting Competition Standard[®] With Weak Antitrust Enforcement

Widespread Consensus that Antitrust Law in the 1960s Was Not Well Grounded in Business Reality or Economics

Necessary Corrections Were Made Based on Economic Learning

Courts Overshot, Imposing Excessive Burdens on Antitrust Plaintiffs

- **General Belief that Markets Self-Correct Not Warranted; Error-Cost Errors**

Today We Can Restore Balance & Reinvigorate Antitrust Enforcement Using the Protecting Competition Standard[®]

Economics is Fundamental to Antitrust, Not a Defense Tool



Protecting Competition in the 21st Century

Globalization and Technological Advances Have Fueled Economies of Scale & Network Effects in Many Industries

- **Firm Size and Market Concentration Have Grown**
- **“Superstar Firms” Are Highly Efficient**

As a Result, We Need Antitrust Enforcement Now More Than Ever

- **The Dangers of Horizontal Agreements Have Grown**
- **The Dangers of Exclusionary Conduct Have Grown**
- **The Dangers from Horizontal & Vertical Mergers Have Grown**
- **True Whether or Not Antitrust Has Been Too Lax in the Past**

FTC Should Focus on How to Strengthen Antitrust Enforcement Using the Protecting Competition Standard[®]





Reinvigorating Antitrust Using the Protecting Competition Standard®

**Enforcement Agencies, Courts, and Congress Can Do Much More
Using the Protecting Competition Standard®**

Horizontal Mergers: Stronger Structural Presumption Plus

- **Predictive Exercise is Imperfect; Use Pricing Pressure Metrics;
Require Strong Evidence for Entry Defense**

Exclusionary Conduct: Greater Use of Direct Evidence of Effects

- **Pay for Delay; Exclusive Dealing; Bundled Pricing**

**Strengthen Antitrust Enforcement Based on New Economic
Evidence and the Reality of Today's Economy**