

COMPETITION POLICY AND ENFORCEMENT

The two primary goals of competition policy are straightforward. Firms should be encouraged to compete. Doing so increases *static efficiency* whereby firms offer consumers products that they value at low prices. Competition policy (known in the US as antitrust policy) should also foster *dynamic efficiency* whereby firms innovate to create new products.

To realize these goals, competition policy also needs to counter the downsides of the profit motive for individual firms. Firms should be deterred from colluding (i.e., firms working together) to fix prices, reduce output, or limit innovations. Competition policy and enforcement should also counter the efforts of individual firms to monopolize markets by excluding rivals.

1. INTRODUCTION

Though the goals of competition policy are clear, actual enforcement is difficult for many reasons. For example, the exchange of information about markets helps participants avoid mistakes but could also facilitate price-fixing. Similarly, cutting prices increases static efficiency, but under some circumstances, so-called predatory pricing could eliminate rivals and reduce competition over time. Another challenge concerns long-term contracts. These contracts are known to encourage investments, but such contracts may foreclose rivals from securing key inputs or accessing distribution capabilities. Another challenge arises when underlying cost conditions only allow for one or two firms to operate efficiently with the result that the market structure is monopoly or duopoly.

In the Section 2 that follows, we review the origins of competition laws. In Section 3 we explain the main goals of competition enforcement. In Section 4, we focus on public enforcement by government agencies, and then turn to private enforcement in Section 5. In Section 6 we address the increasingly obvious differences in how competition policies are enforced across countries and regions. Lastly, in Section 7 we consider the broader objectives (beyond economic efficiency) of competition policies.

Disclosure: The balance of the brief has been written with the support of [ChatGPT](#). Our original question was: “Write a few paragraphs about the origins of antitrust laws and competition policies. Mention English Common Law, Canada in 1889, US in 1990, spread of competition policies around the world.”. We followed with:

- (1) “Write two paragraphs about private enforcement of antitrust laws”
- (2) “Mention that in the United States successful plaintiffs are awarded triple (treble) damages and the losing defendants pay the plaintiffs’ legal fees”
- (3) “Write a few paragraph about the differences in antitrust enforcement decisions around the world. Mention the UK, the EU, the US and China. Use specific examples of something where the EU and US differed in their approach or disagreed in their decision.”
- (4) Could you mention the US, EU, and China?

Lastly, we asked ChatGPT to “write a roadmap paragraph summarizing what will be covered in the paragraphs I copied below”.

2. THE ORIGINS OF ANTITRUST LAWS AND COMPETITION POLICIES

The origins of antitrust laws and competition policies can be traced back to the development of legal systems and economic theories that sought to promote fair competition and prevent monopolistic practices. While the concept of competition has been present throughout history, the formalization of antitrust laws began to take shape in the 19th century.

One of the earliest influences on antitrust laws can be found in English Common Law, which aimed to ensure fair trade and prevent unfair restraints on competition. The common law tradition emphasized the protection of consumer welfare and recognized the importance of competition in fostering innovation and economic growth.

In Canada, the first competition legislation was introduced in 1889 with the passage of the Canadian Anti-Combines Act. This law sought to address concerns over collusion and anti-competitive practices among businesses. While it was a significant step forward, the law did not have strong enforcement mechanisms.

The US played a pivotal role in the development of modern antitrust laws. The Sherman Antitrust Act of 1890 was the first federal statute in the US to explicitly prohibit monopolistic practices and restraints on trade. It aimed to preserve competition as the driving force of the economy and protect consumers from anti-competitive behavior.

The evolution of antitrust laws continued over the years, with significant milestones such as the Clayton Act of 1914 and the Federal Trade Commission Act of 1914, which established the Federal Trade Commission (FTC) to enforce antitrust laws and promote fair competition.

As awareness of the importance of competition grew, other countries around the world began to adopt competition policies. For instance, in 1990, the US played a crucial role in encouraging the spread of competition policies through the Organization for Economic Cooperation and Development (OECD). The US' competition policy model influenced many nations as they developed their own legal frameworks to prevent anti-competitive practices.

Today, competition policies and antitrust laws are enforced in over 200 countries. They vary in their specific regulations and enforcement mechanisms but generally share the goal of promoting fair competition, protecting consumer interests, and ensuring a level playing field for businesses. International organizations like the World Trade Organization (WTO) and the International Competition Network (ICN) play important roles in fostering cooperation and convergence in competition policy across nations.

2. MAIN AREAS OF FOCUS

The main focus of antitrust laws is to promote and preserve competition in the marketplace. These laws target various anti-competitive practices that can harm consumers and hinder market efficiency. One key area of concern is collusion, which refers to agreements among competitors to coordinate their actions, limit competition, and manipulate prices. Antitrust laws explicitly prohibit collusion and actively work to prevent practices such as price fixing, bid rigging, and market allocation schemes. By combating collusion, antitrust laws aim to ensure that businesses compete

fairly and consumers benefit from lower prices, increased choices, and innovation.

Another focus of antitrust laws is the prevention of monopolization or the abuse of dominant market positions. Monopolies can arise when a single firm has substantial control over a particular market, enabling it to restrict competition, set unfair prices, or hinder new market entrants. Antitrust laws aim to prevent such abuses of market power by imposing restrictions on anti-competitive practices employed by dominant firms. This includes practices like predatory pricing, exclusive dealing, tying arrangements, and refusal to deal. By regulating monopolistic behavior, antitrust laws foster a competitive environment that encourages innovation, consumer welfare, and economic growth.

Antitrust laws also address the potential anti-competitive effects of mergers and acquisitions. When companies combine, it can lead to reduced competition and increased market concentration. Merger enforcement under antitrust laws involves reviewing proposed mergers to assess their potential impact on competition. Authorities analyze factors such as market shares, barriers to entry, and potential price effects to determine whether a merger may harm competition. If a merger is likely to substantially lessen competition, antitrust authorities can block the transaction or impose remedies to mitigate anti-competitive effects. The goal of merger enforcement is to balance the benefits of efficiencies and synergies that mergers can bring with the need to protect competition in the marketplace.

3. PUBLIC ANTITRUST ENFORCEMENT

Public antitrust/competition law enforcement around the world involves government agencies responsible for enforcing competition laws and promoting fair competition within their respective jurisdictions. Notable examples of such enforcement agencies include the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) in the US, the European Commission in the European Union (EU), and China's State Administration for Market Regulation (SAMR).

In the US, the DOJ and the FTC are the primary enforcers of antitrust laws. The DOJ's Antitrust Division focuses on criminal antitrust enforcement, targeting activities such as price-fixing, bid-rigging, and market allocation schemes, which are considered serious violations of competition laws. The FTC, on the other hand, concentrates on civil enforcement and preventing anti-competitive conduct that harms consumers and stifles competition. These agencies work closely together to investigate and prosecute antitrust violations, as well as review mergers and acquisitions to ensure they do not harm competition.

In the European Union, the European Commission is responsible for enforcing competition law across its member states. The Commission's Directorate-General for Competition investigates and addresses anti-competitive practices such as cartels, abuse of dominance, and anti-competitive mergers. The European Commission plays a crucial role in promoting fair competition within the EU's single market, imposing significant fines on companies found to have violated competition rules. Its actions often have global implications, as many multinational corporations operate within the EU.

In China, the State Administration for Market Regulation (SAMR) is the primary agency responsible for antitrust and competition law enforcement. China has been increasingly active in enforcing its competition laws, targeting various anti-competitive practices, including abuse of

dominance and cartels. The SAMR has issued substantial fines against both domestic and foreign companies found to be in violation of the country's antitrust regulations. As China's economy continues to grow and integrate with the global market, its antitrust enforcement actions are closely watched by businesses worldwide.

4. PRIVATE ANTITRUST ENFORCEMENT

In some jurisdictions, laws provide private parties to initiate antitrust cases.

Private enforcement of antitrust laws refers to the ability of individuals and businesses to take legal action against anti-competitive behavior. While government authorities, such as antitrust agencies, play a crucial role in enforcing antitrust laws, private enforcement serves as a valuable complement by empowering those directly affected by anti-competitive practices to seek remedies and contribute to the enforcement process.

Private enforcement allows individuals and businesses to file lawsuits seeking damages for harm suffered due to anti-competitive conduct. This enables aggrieved parties to recover losses incurred as a result of price-fixing, market manipulation, abuse of dominant position, or other anti-competitive behavior. Private enforcement not only provides a means of compensation for those affected but also serves as a deterrent, as potential plaintiffs are incentivized to bring cases against anti-competitive firms, knowing they can seek redress for their losses.

Private enforcement also plays a role in enhancing the effectiveness of public enforcement efforts. Private plaintiffs often have access to valuable information and evidence that can assist antitrust authorities in building their cases against anti-competitive firms. Additionally, private actions can help uncover previously undisclosed anti-competitive practices, contributing to a more comprehensive understanding of market dynamics and promoting a stronger enforcement environment.

Overall, private enforcement of antitrust laws serves as an important mechanism to promote fair competition and protect the interests of consumers and businesses. It enhances the effectiveness of public enforcement, encourages compliance with antitrust laws, and ensures that those harmed by anti-competitive behavior have a recourse to seek justice and compensation.

In the US, private plaintiffs have the ability to pursue antitrust claims against businesses, seeking remedies such as treble damages and fee shifting if successful. Treble damages allow plaintiffs to recover three times the amount of actual damages suffered, acting as a powerful deterrent against antitrust violations. Additionally, fee shifting provisions enable successful plaintiffs to recover their attorney fees and costs, encouraging private enforcement by alleviating the financial burden associated with litigation.

5. GLOBAL COMPETITION POLICIES AND ENFORCEMENT ARE NOT HARMONIZED

Over the last seven decades, US authorities have encouraged countries to adopt competition policies and rigorously enforce their laws. Now, over 90 percent of global GDP is in some sense governed by over 120 countries that have adopted competition policies.



This may sound good, but conflicts among jurisdictions are becoming more common. The FTC in the US and the UK's CMA both opposed Microsoft's acquisition of Activision Blizzard. However, the FTC did not object to the proposed acquisition of Giphy by Meta, but the CMA did object.

Antitrust enforcement decisions can vary across different jurisdictions, reflecting the diverse legal frameworks, economic considerations, and policy priorities of each region. A notable example of differing approaches between the European Union (EU) and the US can be seen in their handling of technology companies and potential antitrust violations.

In the EU, there has been a significant focus on scrutinizing the market power and conduct of large tech companies. The European Commission has taken a proactive stance, imposing hefty fines and pursuing antitrust cases against prominent technology giants. For instance, in 2018, the EU fined Google €4.34 billion for abusing its dominant position in the Android mobile operating system market. The EU argued that Google imposed restrictions on device manufacturers to maintain its dominance in search and browser apps, ultimately harming competition. The EU's approach emphasizes the regulation of dominant platforms and ensuring a level playing field for competitors.

In contrast, the US has taken a somewhat different approach to antitrust enforcement against technology companies. While there have been calls for increased scrutiny and regulation, antitrust cases against major tech firms in the US have faced challenges due to the different legal standards applied. For example, the Federal Trade Commission's (FTC) case against Facebook was dismissed in 2021 by a US federal court, which ruled that the agency did not sufficiently demonstrate that Facebook held a monopoly in the social networking market. The US has traditionally emphasized the consumer welfare standard, focusing on harm to consumers in terms of prices and output. This approach can present challenges in addressing potential anti-competitive behavior by technology companies that offer their services for free or engage in practices that may harm competition without directly affecting consumer prices.

China presents another distinct approach to antitrust enforcement. China's antitrust regulations have become more robust in recent years, with a particular emphasis on regulating domestic and foreign technology companies. The Chinese State Administration for Market Regulation (SAMR) has been active in investigating and penalizing companies for various anti-competitive practices. Notably, in 2021, China imposed a record \$2.8 billion fine on Alibaba for abuse of its market dominance. Chinese authorities have also placed an emphasis on data protection, cybersecurity, and safeguarding national interests alongside traditional competition concerns.

These examples demonstrate the differing approaches to antitrust enforcement decisions across jurisdictions. While there may be shared goals of promoting fair competition and protecting consumers, the legal standards, interpretations, and policy considerations can lead to divergence in the specific enforcement actions taken. These differences highlight the complexities and challenges involved in achieving a harmonized global approach to antitrust enforcement.

The US until recent years has been the only jurisdiction that relied heavily on criminal enforcement jail sentences of up to ten years. The US DOJ, which is responsible for criminal enforcement, has been aggressive in prosecuting non-US citizens. This creates an asymmetry across jurisdictions and potential political conflicts. Would the US allow Australia to impose criminal penalties on US citizens? What would happen if the US convicted a Chinese citizen of price-fixing?

6. BROADER POLICY OBJECTIVES

It would be a mistake to view real-world enforcement of competition policies only through a lens of economic efficiency. The US antitrust enforcement began in 1890 in large part because the so-called *trusts* (oil, railroads, commodities) were exerting great political power and generating massive wealth for a small number of businessmen. Today, one can make the case that similar concerns are motivating enforcement actions against “big tech.”

Antitrust laws in the US, the European Union (EU), and China serve broader social and political objectives beyond promoting competition and consumer welfare. In the US, antitrust law has historical roots in addressing issues of economic power concentration and preserving democratic values. It aims to prevent the emergence of dominant firms that can influence markets, shape public policies, and undermine the principles of fair competition. Similarly, in the EU, antitrust enforcement seeks to uphold democratic principles and economic diversity by curbing anti-competitive practices and promoting a level playing field. The EU's focus on preventing the abuse of market dominance aligns with broader social objectives of ensuring economic democracy and protecting the interests of smaller businesses and consumers.

In China, antitrust laws also have broader social and political objectives. China's antitrust regulations have evolved to address concerns regarding market concentration and the impact of dominant players. The country's antitrust enforcement actions, such as the record fine imposed on Alibaba, aim to maintain a balanced market environment, safeguard competition, and foster economic stability. China's focus on addressing anti-competitive behavior aligns with its broader social objectives of promoting fair market access, protecting domestic businesses, and achieving social justice. By curbing excessive market power and promoting fair competition, China's antitrust laws contribute to its broader socio-political goals of economic inclusivity and equitable growth.

Readings:

Louis Kaplow and Carl Shapiro, “Antitrust”, Handbook of Law and Economics, Volume 2, eEdited by A. Mitchell Polinsky and Steven Shavell © 2007 Elsevier B.V.

D Daniel Sokol and Abraham L Wickelgren, Agency objectives, organizational change, and optimizing enforcement, *Journal of Antitrust Enforcement*, 2023, jnad027, <https://doi.org/10.1093/jaenfo/jnad027>.