Why the Consumer Welfare Standard Remains the Best Guide for Promoting Competition

JOE KENNEDY | JANUARY 2019

While it is possible to argue for a more robust antitrust policy, the Consumer Welfare Standard should remain the main criteria to guide policymakers. It offers a flexible yet disciplined framework for evaluating market structure.

The central goal of antitrust policy should be to maintain competitive markets so that companies feel continued pressure to improve quality, lower prices, and boost productivity through constant innovation. Observers have always debated the best way to accomplish this goal in specific cases. But for roughly 40 years the field has enjoyed a broad consensus on the main criteria that should guide policymakers: the consumer welfare standard (CWS). CWS is used to evaluate mergers and competitive practices by whether they harm economic welfare. If they do, then regulators step in to either prevent them or to negotiate agreements to remove the harm. In the absence of harmful conduct regulators generally let market forces determine the best outcome.

As Joe Kennedy writes for Competition Policy International, the adherence to the CWS implies two important tenets. The first is that when evaluating mergers or alleged anticompetitive behavior policymakers should base their decisions on a detailed empirical study of the markets in question. While this can be difficult, current law does not allow regulators to act without developing a strong case that business actions would result in probable harm. Second, regulators and judges do not base their decisions on an idealized version of what the economy should look like. They neither attack nor favor pricing practices, market integration or divestiture, or supply chain policy unless there is clear evidence of harm to other market participants.
Recently, some groups have argued for a more aggressive standard than the CWS. Nicknamed “Neo-Brandeisians” for their adherence to Justice Louis Brandeis’ belief that even moderate levels of market concentration are bad per se, they rightly view the consumer welfare standard as the major intellectual barrier to a more aggressive antitrust enforcement that would atomize markets and punish large firms. While it is possible to argue for a more robust antitrust policy, the CWS should continue to guide public policy.