



Biden’s Antitrust Guidelines Should Scare Every U.S. Business and Every Consumer

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August 15, 2023

President Joe Biden claims regularly that his Administration is for the “middle class,” is there to help “American worker,” and is committed to support America’s families. The reality is otherwise, and it is not just “Bidenomics” that is to blame.

Although little known to the average consumer, it is the legal and regulatory policies of the Department of Justice and the Federal Trade Commission (FTC) that demonstrate most clearly this Administration’s commitment to anti-free market policies that ultimately harm rather than help consumers.

For more than a century and a quarter, one of the sharpest arrows in Uncle Sam’s quiver with which to target alleged uncompetitive forces in the marketplace has been antitrust laws, most enacted in the late 19th and early 20th Century to dismantle large monopolies such John D. Rockefeller’s Standard Oil. To better enforce these laws, in 1919 the U.S. Justice Department grew a new enforcement arm – the Antitrust Division.

It was not until 1968, however, that the Department set clear guidelines by which U.S. companies would be measured if they sought to consolidate. The touchstone was “consumer welfare,” and unlike many (perhaps most) policies designed and implemented by the federal government, this standard made sense. Mergers between companies would be measured by their effect on consumers in the marketplace.

Dan Mitchell, a noted libertarian economist and senior fellow at the Cato Institute, described the “consumer welfare” metric best, when he wrote just last month, that the policy limits the damage that can be wrought on the marketplace because it “create[es] a presumption that mergers are okay if prices go down.”

Of course, as with any government policy, even one that is purposefully sound, sooner or later Congress and Executive Branch lawyers cannot resist monkeying with it and causing distortions. The government’s infamous antitrust litigation against IBM — which began in 1969 and ended 13 years later when Antitrust Division lawyers finally decided the case was “without merit” — is

a prime, but by no means isolated example of the damage that results when the federal government attempts to overzealously enforce its statutory powers.

Nonetheless, over the decades and numerous administrations during which the consumer welfare policy remained largely intact, American consumers have benefitted greatly from marketplace competition. The myriad tech services available to consumers worldwide by U.S. entrepreneurial companies such as Apple and Microsoft, and more recently, Space X, attest to the value of a federal policy focused largely, if not totally, on the benefits to consumers of minimized marketplace meddling.

This all may be coming to a screeching halt if the proposed “Merger Guidelines” made public last month by the Biden Administration go into effect in September. These ill-advised guidelines muddy the long-standing, consumer-welfare based antitrust enforcement policy; replacing it with proposals that will cause innovation to stutter and companies to shrink from completing or even attempting beneficial consolidation. The new policies will also, and not surprisingly, cause antitrust litigation to expand if not explode in coming years.

The document itself, drafted jointly by the Justice Department and the FTC (currently headed by well-known business-consolidation opponent Lina Khan), is gobbledygook from its “Overview” to its lengthy appendices. In this, it mirrors the confusing enforcement actions and inconsistent results achieved thus far by the Biden Administration’s antitrust litigation.