

The Unilateral Conduct Gap Sacrificing Interoperability and Innovation

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The Sherman Act and related antitrust jurisprudence have proven flexible and capable of balancing competitive effects of virtually any kind of concerted conduct among two or more conspirators under the rule of reason. The same flexibility, however, is not available to plaintiffs seeking to remedy unilateral conduct—no matter how anticompetitive—except in very limited circumstances. The current U.S. antitrust framework overwhelmingly fails to reach anticompetitive, unilateral conduct by companies growing upwards of seventy percent in any well-defined product market. This unilateral conduct gap severely restricts the ability to protect interoperability and innovation, particularly with respect to complementary products that increase consumer welfare and choice. Congress should seize upon the rare cross-aisle support for modernizing antitrust legislation to create a new rule of reason cause of action to remedy anticompetitive unilateral conduct separate and apart from Section 2 of the Sherman Act.

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