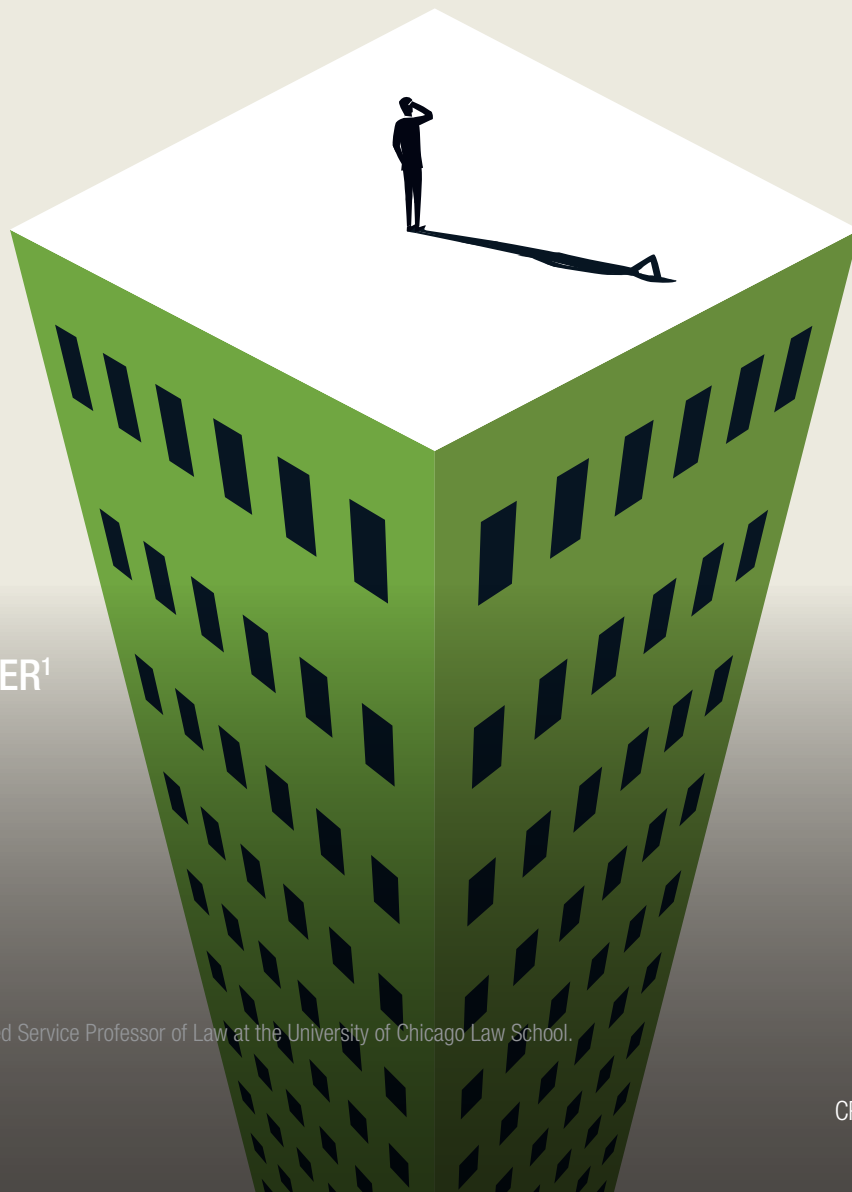


ANTITRUST AT THE CUSP



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As I write this, we are seven months into the global coronavirus pandemic and the feared fall second wave seems to have arrived with no obvious end in sight. China's economy seems to be growing, but other economies are stalled or shrinking as consumers shrink back from a host of normal economic activities. And it is roughly one week before the 2020 U.S. election. There is certainly the possibility of a new President and a new Democratic majority in the Senate (it seems almost certain the Democrats will retain the House).

The House antitrust subcommittee recently released its enormous report on its sixteen-month investigation into digital marketplaces. On Tuesday, October 20, 2020, the long-awaited U.S. antitrust case against Google finally arrived. It is clearly the most significant U.S. antitrust case in the tech section since the 1998 case against Microsoft. That case, of course, would ultimately find that Microsoft had illegally maintained its operating system monopoly in its efforts to stave off the threat posed by Netscape (remember them?). And a break up of Microsoft appeared for a moment, but that possibility faded with a new presidential administration and an understandable desire to get some remedies in place quickly.

Meanwhile, across the globe, antitrust enforcers have undertaken detailed investigations looking at digital marketplaces and especially at the big tech firms. The European Commission has pending investigations into Amazon and Apple and Australia is trying to force Facebook and Google to pony up some of their vast ad revenues in support of local traditional media.

It feels as if antitrust is at the cusp, but the cusp of what exactly? It has become commonplace to suggest that U.S. antitrust law has lagged behind its international competitors, especially in Europe. After all, the FTC dropped its investigation of Google with minimal changes from Google, while the European Commission has completed three investigations in Google, namely, *Google Shopping* in 20xx; *Google Android* in 20xx; and *Google AdWords* in 20xx.

And while it is easy to list these results and total the fines paid by Google to the European competition authorities, it is much harder to identify how these actions have changed actual competition on the ground. Google's worldwide market share in search over the last decade is steady and spectacular (in the neighborhood of 90 percent). The pending remedies for Google Shopping and Android are often criticized by Google's competitors for having had little effect.

And Europe itself looks as if it is changing directions. Chasing Google for a decade and then fighting about exactly how to design the Google Shopping auction no longer looks like the path to rapid progress. Part of what seems to be at stake in this moment is a question of the right boundaries for antitrust and regulation. Europe wants to move faster and earlier, whether that is the recent approach to interim remedies in the *Broadcom* case or the much broader *ex ante* regulatory tool that is currently being thrashed out. Antitrust and competition policy are being pushed to the side in favor of more direct regulatory approaches.

Where does this leave the United States? We should expect Google to mount a vigorous defense to the new suit against it. Large antitrust cases often take years to complete given complex trial schedules, appeals, and time to implement remedies. If the Democrats run the table in November, a more direct regulatory intervention into digital marketplaces might track the roadmap set out in the majority report from the House antitrust subcommittee. That report makes recommendations in three categories: restoring competition in the digital economy; strengthening the antitrust laws; and strengthening antitrust enforcement. Its top two recommendations for new regulations focus on structural separation and line of business restrictions and then rules that prevent discrimination, favoritism, and self-preferencing.

The articles in this issue provide a window into what the antitrust cusp looks like. Two of the articles consider whether the mandate of the U.S. Federal Trade Commission should be expanded. Eleanor Fox & Harry First believe that the FTC should engage in antitrust rulemaking. Again, this reflects the idea that the one-by-one case litigation process is slow and only covers one firm at a time. They want a process instead that makes it possible to address at one time issues across an entire industry, especially for big tech. In contrast, FTC Commissioner Christine Wilson & Pallavi Guniganti consider a proposal to give the FTC greater market investigation powers akin to those held by the United Kingdom's Competition and Markets Authority. Again, the purpose of such powers would be to give the FTC the ability to act on a market as a whole. Wilson & Guniganti believe that it would be a mistake to try to transplant the CMA powers into the FTC.

Former FTC Commissioner Maureen Ohlhausen looks at antitrust amidst the COVID-19 crisis. The crisis has disrupted day-to-day functioning of large parts of the economy and the antitrust agencies have not been exempted from that. They have had to work hard to keep everything up and running. And of course, doing that has highlighted the critical importance of the internet and smartphones through which our lives operate. All of that means that antitrust faces an unusual point of uncertainty. Antitrust at the cusp.

Greg Werden turns to the *Qualcomm* case. The Ninth Circuit recently reversed the lower court ruling that had found that Qualcomm had violated U.S. antitrust laws. The Ninth Circuit opinion has generated lots of critical commentary and there is still a pending en banc petition. Werden argues that the Ninth Circuit did a good job of policing the boundaries of antitrust

— here the boundaries with contract law and patent law. That said, again, with a new administration, Werden fears that there are likely to be new initiatives that will erase those boundaries.

Finally, John Harkrider questions the core narrative regarding the digital marketplaces. He doesn't believe that these markets are particularly distinctive. Instead, he thinks that the attack on these firms represents part of a broader effort to limit the effects of large American companies and that those efforts, if successful, will work to the detriment of American consumers and the overall economy.

Antitrust really does sit at the cusp today. That is driven at least in part by the rise of the great digital tech firms of the day and uncertainty about whether antitrust is the right tool to respond to the issues that they raise. And the fact that these firms operate at scale across the planet means that there is a shared focus for antitrust regulators across the globe. The articles in this issue will help you think through where antitrust should head next, if anywhere. ■