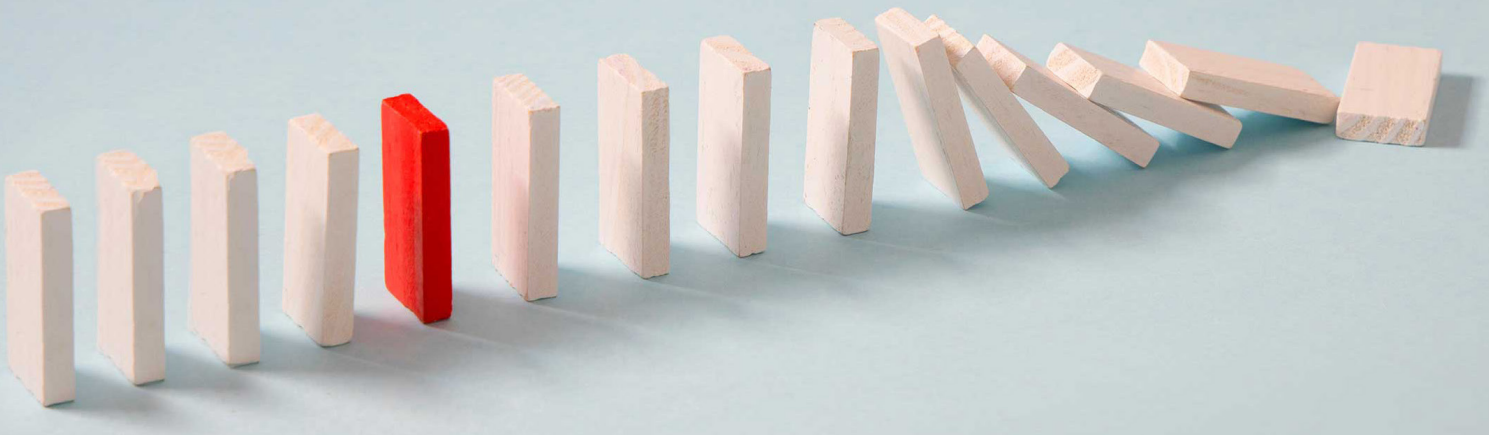
ANTITRUST IN TIMES OF CRISIS



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I. INTRODUCTION

The COVID-19 virus has upended our lives and forced individuals, businesses, and governments alike to adapt with urgent creativity. While many of us are still stuck at home due to public health risks, competition enforcement is alive and well during the COVID-19 crisis. Rather than outright changes in enforcement, however, the greatest impacts to antitrust during this time are coming from the vast disruptions to the global economy and our everyday lives.

We've already started seeing a spike in bankruptcies as a result of these disruptions, which is almost certain to continue for the foreseeable future. And for those fortunate enough to be able to work remotely (like most of us antitrust practitioners), technology platforms like Zoom and FaceTime might be the only safe source of social interaction outside our own households. Bankruptcies and technology platforms are by no means novel issues in antitrust, but the pandemic has made each issue significantly more acute and increased the importance of "getting it right." I'd like to offer the reader my perspective as a U.S. antitrust practitioner and enforcer on where we might be heading on each of these issues.

II. U.S. ANTITRUST ENFORCERS' RESPONSE TO THE PANDEMIC

The most immediate effect on antitrust enforcement in the United States came from the same challenges facing many organizations and workers all around the world: a mass transition to remote work and figuring out how to carry out business functions in a very different virtual world. Antitrust enforcement agencies are made up of regular people too, and they've been forced like the rest of us to figure out how to juggle telework, endless virtual meetings, and perhaps hardest of all, bored children stuck at home! From my own experience, it is amazing how two industrious little girls (in my case, grandchildren) can keep four adults from getting any work done.

Thus, not surprisingly, there were significant delays on many agency investigations through the spring, with the Justice Department insisting on 60-day extensions for their ongoing merger investigations. And the FTC Pre-Merger Notification Office finally relinquished their longstanding requirement for physical delivery of premerger notification filings and set up an e-filing system, which they bill as a "temporary" solution but may very well become the norm as the pandemic forces many to update their approaches.

Aside from these practical challenges, the U.S. antitrust agencies have taken one major step to reduce regulatory burdens during the crisis, by promising in a Joint Statement to analyze and offer formal opinions on competitor collaborations related to the pandemic on a very expedited schedule – aiming to complete in seven days what typically takes several months.

So far at least, they seem to be making good on that commitment. Out of four expedited review requests submitted to DOJ since the Joint Statement was issued, all four had responses clearing the proposal in a week or less.[2] Those approvals may have something to do with the fact that in each case, other U.S. government agencies were working directly with the private parties to coordinate activities in response to the pandemic. Three of the requests related to medical supply distributors collaborating or sharing information on the manufacture, sourcing, and distribution of critical supplies, including medications and biologic treatments through two government-directed initiatives: the ongoing "Operation Warp Speed" and "Project Airbridge," which sought to airlift PPE to areas where it was most needed during the early spikes in COVID-19 cases.3 The fourth case related to information sharing between pork producers, coordinated by the U.S. Department of Agriculture, on how to deal with pork processing shutdowns during the pandemic.4 The FTC has apparently received no requests under its own expedited procedures.[5]

Outside the area of direct COVID-19 relief efforts, however, the agencies' response has largely been to maintain the status quo when it comes to substantive antitrust standards. The Joint Statement ticks through a list of previously-published guidance on permitted competitor collaborations and, not surprisingly, reiterates that the agencies will be vigilant against bad actors using the pandemic as a chance to make a quick buck through price-fixing, bid rigging, or defrauding consumers – perennial problems during any major crisis, but especially now when many people are desperate for protections from the virus, some tried

2 U.S. Department of Justice Antitrust Division, Business Review Letters and Request Letters, https://www.justice.gov/atr/business-review-letters-and-request-letters.

3 See Expedited Business Review Letter Issued to McKesson Corp., Owens & Minor Inc., Medline Industries, Inc., and Henry Schein, Inc. (Apr. 4, 2020), https://www.justice.gov/atr/page/file/1266511/download; Expedited Business Review Letter Issued to Amerisource Bergen Corp. (Apr. 20, 2020), https://www.justice.gov/atr/page/file/1269911/download; Expedited Business Review Letter Issued to Eli Lilly & Co., AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK (July 23, 2020), https://www.justice.gov/atr/page/file/1297161/download.

4 See Expedited Business Review Letter Issued to National Pork Producers Council (May 15, 2020), https://www.justice.gov/atr/page/file/1276981/download.

5 Law360, FTC Antitrust Deputy Goes from Crisis to New Normal (Sept. 4, 2020), https://www.law360.com/competition/articles/1306818/ftc-antitrust-deputy-goes-from-crisis-to-new-normal-.

and true and some more dubious, and less scrupulous companies may be trying to preserve their profits by any means necessary.

This is not to say that things haven't changed for our enforcers in the U.S. – but that the most significant changes in antitrust as of yet are due to rapid shifts in the economy and the facts on the ground, rather than shifts in policy so far. In fact, the agencies have resisted calls for dramatic policy action from all sides, ranging from a prohibition on merger activity during the pandemic to more lax standards for firms in distress. The DOJ's antitrust chief, Makan Delrahim, described a merger moratorium as "misguided" because such a ban would likely prevent companies from securing financial backing to keep their employees on the payroll during the crisis.[6] But at the same time, he noted that DOJ would be applying the same tried-and-true, and very difficult to meet, standard for "failing firms" to be bought out by competitors in mergers that would otherwise be anticompetitive.

Soon after that, Ian Conner, the Director of FTC's Bureau of Competition, published a blog post on what he sees as an excessive number of "failing firm" claims over the past few years, both before and during the pandemic.[7] His warning to antitrust practitioners was simple: the FTC "will not relax the stringent conditions that define a genuinely 'failing' firm" simply because of difficult market conditions, and "will require the same level of substantiation as [was] required before the COVID pandemic."

The DOJ's second-in-command for antitrust, Barry Nigro, has emphasized how the economic impacts from COVID-19 could go both ways in easing or exacerbating a merger under review – for example, by strengthening the rationale for an acquisition on one hand or by making entry harder and weakening market competition on the other.[8] The common theme in all this is that merger review is still, as it always was, a fact-intensive inquiry that has to be approached case-by-case.

III. RISE IN PANDEMIC-RELATED BANKRUPTCIES

In the first few months of the pandemic, it appears that the collapse in economic conditions has put a significant hamper on merger and acquisition activity. Both Barry Nigro and Ian Conner noted significant drops in merger filings at their respective agencies.[9] But at some point, as the pandemic continues to spread and temporary government aid runs out, we're likely to see the unfortunate results of extended economic shutdowns as companies seek deals while in (or as an alternative to) bankruptcy. We've already seen a number of high-profile bankruptcies in the U.S. at least partly as a result of COVID-19 across a range of industries: retailers like J.C. Penney, Neiman Marcus, GNC, and Brooks Brothers; energy companies like Chesapeake Energy, Valaris, and California Resources; gyms, restaurants big and small, airlines; all together more than 200 in total.[10] Not all of these will lead to transactions raising antitrust concerns, of course, but those that do will often require expedited review and consideration of complex issues relating to the continued viability of the bankrupt firm, especially with virus cases beginning to rise again in many areas and some jurisdictions reversing course on their reopening plans.

These issues aren't limited to the narrow "failing firm" defense that was the subject of Ian Conner's cautionary blog post, where he accurately described it as "often made but rarely accepted." But just because it's rarely accepted outright doesn't mean that antitrust practitioners are wasting their time presenting facts and arguments about the precarious financial condition of a bankrupt or soon-to-be bankrupt firm. One of the core questions with any transaction between competitors is whether those firms' recent market shares are a good predictor of future success in the market, and few events have the ability to flip the competitive *status quo* like a global pandemic that has caused the bottom of consumer demand to fall out completely for many products and services. Of course, if every player in an industry is collapsing at the same rate, no matter how dramatic, that won't necessarily move the competitive needle for antitrust analysis – or as Ian Conner colorfully put it, you can't "justify [a] merger on the basis that if you tie two sinking rocks together, they're more likely to float." But if there's a real story to tell (or more importantly, support with evidence) about the pandemic driving new competition from innovators who have proven more adaptable than old guard market leaders, that story is more believable now than ever.

One recent example from before the pandemic helps to illustrate how even deals that "fail" the failing-firm test can still pass agency review by relying heavily on the financial condition of

6 Global Competition Review, Delrahim: DOJ's Head Not Stuck in the Sand Amid Pandemic (May 14, 2020), https://globalcompetitionreview.com/article/usa/1226815/delrahim-doj%E2%80%99s-head-not-stuck-in-the-sand-amid-pandemic

7 Federal Trade Commission Blog, On Failing Firms – and Miraculous Recoveries (May 27, 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/05/failing-firms-miraculous-recoveries.

8 Global Competition Review, Nigro: Pandemic Having Significant Impact on Merger Review (June 1, 2020), https://globalcompetitionreview.com/article/usa/1227360/nigro-pandemic-having-significant-impact-on-merger-review.

9 See *supra* notes 7 and 8.

10 Bloomberg, The Covid Bankruptcies: Vegas Monorail to New York Retail Icon (Sept. 11, 2020), https://www.bloomberg.com/graphics/2020-us-bankruptcies-coronavirus/.

the target firm. Back in 2017, M&G Chemicals, a producer of plastic PET resins used in many consumer products, including soda bottles, went bankrupt while in the process of building a new, highly efficient resin plant in Corpus Christi, Texas.[11] In early 2018, several companies submitted bids for the partially-built plant, including three competitors of M&G. Eventually those three competitors formed a joint venture for the purpose of submitting a joint bid to complete the plant and operate it as a toll manufacturing facility, splitting the capacity between them. At this point the FTC intervened, putting the sale on hold while they investigated concerns about collusion and information sharing between the JV participants, and increased concentration in PET resin production.[12]

Under normal circumstances the purchase would certainly have raised enforcer eyebrows – the FTC's complaint estimated that the three JV partners controlled 90% of domestic PET production, and the plant would put an additional two-thirds of outstanding capacity under their collective control.[13] After a nine-month investigation, FTC cleared the plant purchase with a 20-year consent order imposing a number of conditions to prohibit information sharing, cap each competitor's ownership at one-third, mandate usage of the plant's full capacity, and monitor compliance with the order.[14] Given the high levels of concentration, it seems plain that the possibility of permanently losing the low-cost capacity from M&G's unfinished plant must have weighed heavily in the FTC's decision. The FTC's press release announcing the consent order specifically mentions the importance of "remov[ing] uncertainty about the future of the plant" and giving it "necessary support and funding for timely completion."[15] That sounds an awful lot like the justification for a failing firm defense, even though the defense was never specifically invoked in that case.

The Corpus Christi example is just one data point on a spectrum of distressed asset purchases, and whatever deals materialize during the COVID-19 crisis will need to be evaluated for their own unique facts and circumstances. Financial dire straits won't be a silver bullet in most mergers even in these times, but I think we can expect those concerns to take center stage with many acquisitions across a number of industries.

IV. RELIANCE ON TECHNOLOGY & ONGOING INVESTIGATIONS

If there's one point that has been made crystal clear by the pandemic, it's that technology platforms have become a central support system in our daily lives. Before COVID-19, we at least had the option of meeting friends at a restaurant, seeing a movie, or going out for a little retail therapy as an alternative to social media and other digital communication tools. Now, what used to be the simplest and most innocent of social interactions can turn into a "superspreader"[16] event, and our free time is as likely to be spent "doomscrolling"[17] the latest bad news as anything else. Add to this pandemic vocabulary the newly-minted verb "Zooming" to describe how many of us are communicating these days, and you start to get a sense of the enormity of this cultural shift. And it's not just our need for social interaction driving that shift, but the need for efficient technologies to keep businesses running remotely or to power essential tools to fight the public health emergency, like contact tracing applications, or to provide food to vulnerable populations who do not want to venture to the grocery store.

To take a brief detour to highlight one bright spot that has emerged during the pandemic, in the U.S we have seen the widespread suspension of a variety of licensing and regulatory rules that had previously burdened new competitive business models, many of them enabled by online capabilities. From telemedicine across state lines to home food and alcohol delivery, consumers' need for these necessities and comforts in these distressing times have finally overcome the stubborn persistence of regulations that no longer serve the public interest, assuming

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11 Federal Trade Commission, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Corpus Christi Polymers LLC*, No. 181-0030 (Dec. 21, 2018).

12 In the interest of full disclosure, I note here that that two of my current colleagues at Baker Botts, Steve Weissman and Michael Perry, represented Indorama, one of the JV partners, in the transaction. Also, I was chairman of the FTC when it started its investigation and played no role in the matter after leaving the Commission.

13 Complaint, *In re Corpus Christi Polymers LLC*, at 4, available at https://www.ftc.gov/system/files/documents/cases/181_0030_c-4672_dak_indorama_complaint_2-25-19.pdf.

14 Decision and Order, *In re Corpus Christi Polymers LLC*, available at https://www.ftc.gov/system/files/documents/cases/181_0030_c-4672_dak_indorama_decision_and_order_2-25-19.pdf.

15 Federal Trade Commission, FTC Imposes Conditions in Joint Venture Among Three Producers of PET Resin (Dec. 21, 2018), https://www.ftc.gov/news-events/press-releases/2018/12/ftc-imposes-conditions-joint-venture-among-three-producers-pet.

16 See Scientific American, How 'Superspreading' Events Drive Most COVID-19 Spread (June 23, 2020), https://www.scientificamerican.com/article/how-superspreading-events-drive-most-covid-19-spread1/.

17 NPR, Your 'Doomscrolling' Breeds Anxiety. Here's How to Stop the Cycle (July 19, 2020), https://www.npr.org/2020/07/19/892728595/your-doomscrolling-breeds-anxiety-here-s-how-to-stop-the-cycle.

that they ever did.[18] The FTC's Economic Liberty Task Force has been focused on this issue since 2017,[19] but little did we know that the COVID-19 virus would be the instrument to bring revolutionary change in this area! While we all wish the virus a swift departure from the world, I hope these reforms will remain long after it has gone.

Of course, our reliance on technology and concerns about competition in those markets is not something new to the pandemic. As readers will surely know, there has been a global focus on the competitive impact of large technology platforms in particular for much of the last two years. In the U.S., that has taken the form of a high-profile Congressional investigation and concurrent investigations by each of our two antitrust enforcers, DOJ and FTC. FTC was first out of the gate, announcing in February 2019 the formation of a Technology Task Force, later formalized as the Technology Enforcement Division, to investigate potential anticompetitive conduct in technology markets as an outgrowth of its ongoing Hearings on Competition and Consumer Protection in the 21st Century.[20] A few months later in June, after rumors started circulating that DOJ was opening a probe of Google, the U.S. House of Representatives announced its own probe of the industry, focusing on Google, Facebook, Amazon, and Apple.[21] Finally, in July 2019, the DOJ formally announced a review of "whether and how market-leading online platforms have achieved market power and are engaging in practices that have reduced competition, stifled innovation, or otherwise harmed consumers."[22]

Not surprisingly, the Congressional investigation has garnered the most press due to its inherently public nature and its high-profile hearings, including one just over a year ago regarding online platforms and market power at which I testified as an antitrust expert. Fast forward to late July of this year, and call it vigorous oversight or political theater, but the sparks definitely flew when executives from Google, Facebook, Amazon, and Apple were in the hot seat and being grilled on their practices, particularly vis-à-vis small competitors using their platforms. Although the hearing did not suggest a bipartisan interest in changing the U.S. antitrust laws or in moving away from the consumer welfare standard, it did showcase an array of competitor complaints, concerns about tech's impact on the business model of traditional media, and alleged viewpoint bias.[23]

One of the most fascinating parts of the intense tech scrutiny of late is how the appetite to ramp up technology oversight seems to cross ideological lines. The two ends of the political spectrum might disagree on which practices should be of most concern — whether it is breaches of privacy, power over small competitors, buying out nascent entrants, or political censorship — but there seems to be widespread concern on the *ability* of the big tech platforms to do all these things, regardless of whether it impacts consumers or ultimately violates antitrust law. With large swaths of the U.S. economy still shut down to varying degrees, the undeniable spike in our reliance on all this technology is only going to add fuel to the fire to closely scrutinize every action by the big tech companies. That said, the agreement fades when it comes to what should be done about all this, or even how to interpret the data that informs what we should be doing.

Consider two competing letters sent to the House Judiciary Committee in recent months, each signed by a number of distinguished antitrust and economic experts, but arguing for different visions of the future of enforcement. The first, coordinated by the Washington Center for Equitable Growth, argued that U.S. antitrust laws have been chronically underenforced as a result of court decisions that have ratcheted up the standards of proof for government and private antitrust plaintiffs alike to the point where a wide array of anticompetitive conduct is effectively immunized.24 With regard to market concentration, they view lax enforcement as responsible for growing corporate power in several sectors of the economy, resulting in heightened problems with monopolistic conduct and loss of competitive benefits for consumers. The authors see those problems as par-

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18 Another disclosure: The impact of burdensome occupational licensing on people on the bottom of the economic ladder was a signature issue of mine when I was FTC chair and I founded an Economic Liberty Task Force to focus on it. See, e.g. Maureen K. Ohlhausen, *Death by a Thousand Haircuts: Economic Liberty and Occupational Licensure Reform* (July 2017) https://www.ftc.gov/system/files/documents/public_statements/1234173/ohlhausen_-_heritage_foundation_licensure-econ-liberty_7-26-17.pdf.

19 Federal Trade Commission, Economic Liberty, https://www.ftc.gov/policy/advocacy/economic-liberty.

20 Federal Trade Commission, FTC's Bureau of Competition Launches Task Force to Monitor Technology Makrets (Feb. 26, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

21 Politico, House Lawmakers Open Antitrust Probe Into Tech Industry's Biggest Players (June 3, 2019), https://www.politico.com/story/2019/06/03/antitrust-tech-industry-google-facebook-1352388.

22 U.S. Department of Justice Antitrust Division, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

23 See Rev.com, Big Tech Antitrust Hearing Full Transcript (July 29, 2020), https://www.rev.com/blog/transcripts/big-tech-antitrust-hearing-full-transcript-july-29.

24 Washington Center for Equitable Growth, Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets (Apr. 30, 2020), https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.

ticularly acute with large technology platforms that tend to be "'winner-take-all' or 'winner-take-most' markets." Though it's never stated explicitly, it's difficult to read the authors' recommendations without getting the sense of an assumption that any successful technology platform — which, almost by definition, have beat out other platforms to become the preferred choice of consumers — must have obtained or be maintaining that success in an anticompetitive way.

On the other hand, a second letter written by a more conservatively minded group of scholars and practitioners (including myself), argues that these concerns are not backed up by the empirical evidence. In particular, we argue that Congress should not be so quick to overturn decades of thoughtful and incremental interpretations of antitrust law from the U.S. courts, which has largely been moving away from a populist approach of arresting concentration even at the expense of overall economic welfare back in the 1960s, to an evidence-based approach today that considers each specific merger or activity's likely effects on net consumer welfare. Rather than condemning the victors of "winner-take-all rivalry"[25] for their successful efforts, this group of authors sees them as illustrations of the benefits for consumers that arise out of the battle to become the *next* winner through competition on the merits. We also share a belief that the U.S. antitrust laws as written have the necessary flexibility to promote competition and combat abuse in high-technology markets, and that radical changes could easily be counterproductive if not based on a solid evidentiary foundation. That said, there are several areas of common ground between the two camps for common-sense reforms, including increasing enforcement agency transparency, increasing the appropriate use of merger retrospectives, enhancing criminal antitrust penalties, streamlining cooperation between the DOJ and FTC, and providing more agency funding.

The House Subcommittee's Majority Staff Report, finally released on October 6, 2020, and the Republican response fell largely within these staked-out positions. The Majority Staff Report makes sweeping recommendations to transform U.S. antitrust law. These include making "dominant platforms" a specially disfavored class required to notify the government of any deal, no matter how small, and losing the protections of time-limited review under the HSR process; codifying bright-line presumptions against *any* big tech merger and any other merger passing a 30% market share threshold; and overriding recent Supreme Court decisions on vertical merger and conduct enforcement.[26] The Republican response pointed out many of the areas of common ground: concerns that big tech platforms have abused their powerful positions in some instances, a need for greater transparency and data portability, and the need for some prophylactic measures to prevent excessive big tech acquisitions.[27] But not surprisingly, the counter-report also pushed back against the "dramatic" and "sweeping" recommendations of the Majority Report and advocated for a more "targeted" approach to avoid unwelcome consequences for the economy.

This article thus far has centered on antitrust in the United States, but the focus on technology markets is hardly an American phenomenon. The European Commission has its own investigations of Amazon, Google, Facebook, and Apple open at various stages.[28] In a recent interview, Margrethe Vestager was asked a number of questions on the impact of COVID-19 on the Commission's enforcement priorities, which were also well suited to her new title as Executive Vice President for A Europe Fit for the Digital Age. Her reaction to the rise of the role of technology during the pandemic was to amplify calls for preemptive regulatory action to preserve a choice between competing options before any one platform gains a dominant foothold. While it's unclear exactly what form this "anti-tipping" regulation will take, it has clear parallels to the calls to transform antitrust in the U.S. to prevent the accretion of market power rather than simply to stop anticompetitive conduct or transactions.

V. CONCLUSION

Despite the dramatic changes to our daily lives forced by the COVID-19 pandemic, there have been no major changes so far to the process or legal standards for merger review in the United States. Once the current lull in merger activity begins to pick up, we can likely expect to see a significant increase in claims of financial distress for the target firm, whether that means deals in bankruptcy or deals to avert bankruptcy. The pressure on enforcers to be vigilant and take swift action is likely to grow as the pandemic drags on and our reliance on that technology becomes even stronger. Along with that will come proposals, like those we've seen already, to dramatically reform antitrust laws and take unprecedented steps to regulate and remediate what some view as entrenched economic power in technology

25 International Center for Law & Economics, Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets (May 15, 2020) at 2, https://laweconcenter.org/resource/joint-submission-of-antitrust-economists-legal-scholars-and-practitioners-to-the-house-judiciary-committee-on-the-state-of-antitrust-law-and-implications-for-protecting-competition-in-digital-market/.

26 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations (Oct. 6, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

27 Rep. Ken Buck, The Third Way (Oct. 6, 2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

28 Foreign Policy, Margrethe Vestager is Still Coming for Big Tech (July 4, 2020), https://foreignpolicy.com/2020/07/04/margrethe-vestager-is-still-coming-for-big-tech/.

and other markets. The bottom line as this author see it: this is as uncertain a time for antitrust as I have seen in my career, going right along with the urgency and uncertainty of the public health situation. It is nearly impossible to predict where we will be even one year from now, but it is sure to be a fascinating year for those of us who have made competition issues our life's work. And, due to the reductions in licensing and other barriers, many antitrust observers in the U.S. will be able to order a bracing drink delivered to their door while they watch it unfold.