WE NEED RULES TO REIN IN BIG TECH

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I. INTRODUCTION

The Big Tech firms are on antitrust radar screens all over the world. Critics allege that Big Tech has taken over our lives, manipulated our minds, invaded our privacy, appropriated our data, and squeezed out all budding rivals to keep control. "Break them up" is a popular cry. Supporters claim that Big Tech (which we shall call the GAFA, for Google, Apple, Facebook, and Amazon) have brought so much pleasure and ease to our lives; that they enhance the ways we communicate with our friends and suppliers and customers, and they help us get goods fast, often at zero price; and that antitrust intervention will only handicap their efficiency and inventiveness and punish success.

The German Bundeskartellamt was the first enforcer to lay out the case for antitrust against the big platforms. The European Union was close behind, and in some respects ahead – it brought early cases against Google. The EU is now the center of the world conversation on how to rein in Big Tech. Not only has the European Commission issued three decisions against Google, but – advancing its vision of a single digital market – is contemplating two new avenues: 1) *ex ante* rule-making, to declare certain conduct illegal, and 2) a possible new tool to correct structural problems that may not be addressed by current law, especially in markets that are tipping to dominance.[2]

The GAFA are U.S. companies. Where are the U.S. enforcers? The U.S. has lagged behind. It has not been part of the international conversation. As we write, the Justice Department and eleven states have filed a lawsuit against Google; seven more states may follow with their own suit; and the FTC might file suit against Facebook by the end of the year. The Justice Department's suit, though, is narrowly focused on conduct relating to Android and mobile phones; perhaps others will be broader. In any event, a long litigation road is forecast, with an unclear remedy at the end.

A Congressional subcommittee has not been at all reluctant. The House of Representatives Antitrust Subcommittee of the Judiciary Committee has just completed year-long hearings, capped by five hours of grilling the GAFA CEOs, and has released a majority staff report that musters the evidence and proposes a path forward for controlling the GAFA.[3] The report recommends that Congress consider a wide array of legislative changes, from restructuring platforms to reduce conflicts of interests, to legislating a variety of rules that would address anticompetitive abuses, to changing merger law presumptions, to overruling a number of judicial decisions that have unduly narrowed antitrust law and enforcement.[4]

The Report's findings are thorough and its proposals ambitious. Without embracing each and every proposal, we applaud the effort. Small steps are not going to suffice.

The immediate challenge, however, is to translate the critique of Big Tech into quick action. It is in this spirit that we focus here on ex ante rule-making by the Federal Trade Commission. We think this is the cleanest, simplest way (although nothing is simple) to announce to the leading platforms that specified behavior violates the law and will not be tolerated. These rules would by-pass the formidable hurdles posed by existing U.S. antitrust jurisprudence, break out of the labyrinthine complications and minimalism that have handicapped antitrust enforcement, and allow a holistic approach to problems that cannot be solved with silo thinking.

We divide the remainder of this essay into four parts. 1) A description of what we understand to be persistent anticompetitive and unfair behavior of the GAFA. 2) Why case-by-case Sherman Act adjudication is not enough. 3) Why wholesale breakups and a new regulatory agency may be too much. 4) The special advantages of *ex ante* rule-making in the FTC.

II. RECURRENT ANTICOMPETITIVE AND UNFAIR BEHAVIOR OF THE GAFA

Various acts, practices and strategies of the GAFA have now been well documented. Certain structural factors make the strategies possible, and we start with them.

The Big Tech platforms are in network industries. The network effects are so great (everyone wants their friends on the same platform, suppliers want their buyers on the same platform, etc.) that barriers to entry are very high, and even the most promising prospective entrants have trouble finding the critical mass of users necessary to enter. There are periods of competition *for* the market; thereafter the market may tip to one dominant firm. A critical element of this new platform economy is data. The platforms vacuum up huge amounts of data from users of

2 See European Commission, Impact Assessment for a possible New Competition Tool https://ec.europa.eu/competition/consultations/2020_new_comp_tool/index_en.html; Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers.

3 See Majority Staff Rep. and Recs., Subcomm. on Antitrust, Commercial, and Admin. Law, Comm. on Jud., Investigation of Competition in Digital Markets (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

4 See *id.* at 378-405.

the platforms, and use the data not only for efficiencies but also for exploitations and exclusions.

Here are some of the alleged practices. The platforms take much more data than they need to service the platform's users. Often, they take data without asking. In view of recent regulations, they may now ask users for consent, but they deny the use of the platform without consent. The platforms take and combine data from third party sources, as Facebook has done with the "likes" function on non-Facebook platforms. With the extensive data they collect, the platforms learn detailed private facts about their users, including what the users want to buy, and the platforms are able to sell highly curated space to advertisers, for which the advertisers pay large sums of money. Platforms have been found to use their data troves to "spy" on platform users, and to appropriate for themselves the best ideas of their rivals; for example, to preempt rivals' innovative features. Moreover, the platforms have used their data troves to learn which start-ups are likely to become significant challengers, and to buy or squash these young emerging rivals. In addition, platforms disable rivals who are getting "too good," as Facebook did to Vine when it cut Vine users off from the usual function of sending short videos to their friends. When in dispute with their users, platforms have been found to hide the "send" or "order" button that the user depends on to do business. Dominant platforms are often gatekeepers; they compete with the businesses that they host on their platforms. Not atypically they prefer and prioritize the platforms' own offerings to those of the rivals, even when the rivals' offerings are superior. They demote rivals and drive some out of business by demotions. They have sometimes designed their systems to resist operability with competitive alternatives, and have frustrated users' portability of their own data. In addition, the platforms have used various tying, bundling, and exclusivity practices to leverage and entrench their own product, as Google Search has done with Apple and Android operating systems; and they have preempted markets for themselves, as Google has done as ad broker for all advertising placed on through Google, and Apple has done through the Apple Play Store as the exclusive route to reach iPhone users.

We have characterized these strategies as unfair or anticompetitive behavior. The GAFA do not agree that the conduct is anticompetitive, and point out that antitrust does not reach what is "merely unfair." Courts' determination that conduct is "anticompetitive" depends on complicated theories of harm and implicates teams of economists and lawyers. FTC rule-making will by-pass this thicket. The FTC can make rules against conduct that is not only anticompetitive but also unfair, deceptive or otherwise harmful to consumers, and invasive of privacy. The platforms threaten all of the above interests. We need cross-cutting jurisprudence and one not bogged down by technocratic distinctions that miss the big picture.

III. WHY CASE-BY-CASE SHERMAN ACT ADJUDICATION IS NOT ENOUGH

If these strategies are anticompetitive, why not deal with them through case-by-case litigation under Section 2 of the Sherman Act, as is now being contemplated?

The answer is: weak legal doctrine and long litigation time.

Through Supreme Court adjudications since the famous *Trinko* case in 2004,[5] the reach of the Sherman Act has shrunk. The Supreme Court has deliberately confined the law's reach, based on the ideology of the Court's majority that markets work well, that antitrust intervention makes errors in protecting small competitors from competition thereby harming consumers, and that firms acting alone (that is, not as part of a cartel), even dominant firms, have the incentives to act in consumers' interests. These assumptions do not align with reality.

To win a Section 2 case, a plaintiff has to prove a relevant market and that the defendant has monopoly power or is dangerously close to getting it. Traditionally, and in the view of conservative judges (whose numbers are increasing), this means that the plaintiff has to prove that the defendant has the power to lessen output across the market and raise prices. (This narrow view is contested and power to harm innovation is added as a possible harm, but, by the conservative view, restrictions on dominant firm freedom to act would harm innovation.) The GAFA appear to have a new kind of platform-based power that does not fit easily into the traditional paradigm of monopoly.

Even if the challenge of the first step (market definition and monopoly power) is met, the plaintiff has to prove conduct that constitutes monopolization. By the conservative view, this means that the defendant, by its challenged conduct, must get more power to raise price and lower output; or at least entrench its existing power. Moreover, under U.S. law, a dominant firm has no duty to deal, no duty to deal fairly, and no special responsibility, lest it pull its punches and protect small rivals from competition. So, proof that particular conduct constitutes monopolization is again a huge challenge, with the deck stacked against plaintiffs. The persistent acts of platforms described above do not all qualify as acts of monopolization under the conservative definition of "anticompetitive." To be sure, the litany of acts make it more difficult for consumers to exercise choice; they make it more difficult for emergent competitors to compete on the merits and develop and diffuse their own innovations. These effects easily fit an accepted

5 *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

theory of anticompetitive harm in Europe,6 but they present difficult challenges under U.S. law.[7]

It will not be easy for plaintiffs to win Sherman Act cases against the big platforms in the United States, but it will also take a very long time to litigate the cases. Section 2 litigation commonly stretches out. The case against Microsoft, for example – the last case against a dominant platform – took thirteen years from the filing of the complaint to the conclusion of the remedy proceedings. That is too long. While the litigation process creeps on, the platforms will simply continue their opportunistic behavior if no specific rules forbid it.

The case-by-case process in general has much merit. Cases against the platforms should of course proceed. But the litigation process will be too long and too uncertain, and will proceed under jurisprudence that is too indulgent to incumbents, to trust it as a fruitful route to control the GAFA.

IV. WHAT ABOUT LEGISLATIVE RESTRUCTURING?

The Report recommends restructuring the platforms to reduce the conflicts of interest that platforms have in view of their status as both gatekeepers of the platform and rivals on it. The restructuring would separate functions and impose line-of-business restrictions to keep the platforms from re-entering these businesses; both approaches have been used in the past, through legislation and court decree. There have also been legislative proposals to restructure the big platforms to end their monopoly power.

Restructuring can be an attractive possibility, carrying with it the opportunity to change a dominant firm's incentives so that it will compete on the merits rather than through exclusion. Restructuring proposals are also challenging. Efficiencies need to be considered as do incentives for innovation. Restructuring is not impossible, but it will be time-consuming.

Moreover, separations policies require continuing supervision, as we have seen in the banking, telecommunications, and utilities industries where such policies have been implemented. Each of these industries had pre-existing regulatory authorities to which these responsibilities could be assigned, however. Platforms do not. This would mean setting up a new regulatory agency, again, not impossible but time-consuming and contentious, as we have seen in the establishment of the Consumer Financial Protection Board.

V. OUR PROPOSAL: *EX ANTE* RULE-MAKING BY THE FTC

Rule-making is the right tool right now and the FTC is the right body right now. Just as the district court in *Microsoft* imposed interim conduct rules pending a decision on a more long-term restructuring, so, too, the FTC could now act to deal with the problems that have been identified and to pry open these markets to greater competition without waiting for other solutions.

It is quite clear that some or all of the biggest tech platforms have significant, stable market power. Reports and studies all over the world have so found. The FTC could adopt rules to apply to a set of the leading platforms and gatekeepers. Definition of "leading platform" and "gatekeeper" can be appropriately formulated. As European Commission Vice President and Competition Commissioner Margrethe Vestager recently said, this is "not rocket science."[8] The prospective rules would apply to specified conduct. We now have lists of conduct that appear on its face to be offensive and inefficient. After appropriate hearings, rules can specify the targeted conduct and, where consumer benefits might possibly be claimed, shift the burden to the platforms to prove this case.

We think that there is a good legal argument that the FTC has the power to make rules related to "unfair methods of competition."9 We recognize that the Commission has exercised antitrust law-based rulemaking apparently on only one occasion and with a rule that does not have the scope for which we advocate here.10 Congress could enact clarifying legislation to make the Commission's authority clearer, but we don't think that the Commission needs to wait.

Big Tech argues that rule-making is a wrong tack because antitrust violations are complicated and rule-making is blunt. They argue that rules are likely to reach too far; they may prohibit conduct that is pro-competitive, efficient, and innovative. We do not worry. Thanks to the Congressional hearings and hearings by the FTC, we have a good deal of information and a good start. The FTC has strong expertise and we are confident that the Commissioners and staff will listen carefully at rule-making hearings and produce rules that are sound, not overly broad, and sufficiently flexible.

6 See Eleanor Fox, Platforms, Power, and the Antitrust Challenge: A Modest Proposal to Narrow the U.S.-Europe Divide, 98 Neb. L. Rev. 297 (2019).

7 *Id.*

8 Quoted in Janith Aranze, EU and U.S. enforcers clash on digital regulation, Global Competition Review, 14 Sept. 2020.

9 See 15 U.S.C. § 46(g); Rohit Chopra & Lina Khan, The Case for Unfair Methods of Competition Rulemaking, 87 U. Chi. L. Rev. 357, 375-79 (2020); Justin Hurwitz, Chevron and the Limits of Administrative Antitrust, 76 U. Pitt. L. Rev. 209, 232-37 (2014).

10 See Discriminatory Practices In Men's and Boys' Tailored Clothing Industry, 32 F.R. 15584-86 (1967) (Trade Regulation Rule issued to obtain compliance with §§ 2(d) and (e) of Robinson Patman Act) (repealed 1994).

What might FTC rules look like? Of course, this depends on the hearings and the evidence presented in the rulemaking proceedings. For example, FTC rules might provide:

1. Leading digital platforms may not appropriate data from the firms they host on their platforms. They may not use the rivals' data to appropriate the rivals' ideas for their own products.

2. Leading digital platforms may not disable their rivals' access to usual platform services to punish the rivals for competing. They may not disable or decrease services by leverage or sabotage.

3. Leading digital platforms that compete with the businesses they host on their platform are gatekeepers. Gatekeepers may not give preferred positioning or other unearned advantages to their own businesses, and may not demote their rivals to get a competitive advantage.

4. Leading digital platforms may not block a user's portability of its own data. (Portability helps people and firms move to a competing platform.)

5. Leading digital platforms must make the platform's architecture interoperable with competing platforms and alternatives, absent good business justifications.

6. Leading digital platforms may not acquire nascent rivals to suppress or co-opt their competition.

Some of this listed conduct will raise questions of fact and interpretation. Did the platform appropriate the rivals' data? Did it punish or sabotage a competitive rival by hiding its "buy" buttons," cutting off its data access, or manipulating its algorithms? What counts as a justification? But at least the question will not be: Was the platform a monopoly? Is the "market" two-sided? Did the conduct increase the platform's monopoly power, suppressing the output of social media or search? What was the effect on price or output of digital advertising?

Will FTC antitrust rule-making be fast and easy? No. Big Tech and their lawyers are likely to resist. They may make proposed rules sound overly complicated. They may raise the specter of bad rules chilling their innovation and setting back the country (against China). But their contributions should be listened to, and should help the FTC devise good rules.

Even if good rules are adopted, will they change the behavior of Big Tech? This is a serious question. What sanction will keep Big Tech in line? Congress needs to legislate to add fining remedies to the FTC's tool chest[11]. Perhaps other additions are in order. Experience shows us that even high fines might not deter corporate conduct. Naming and shaming can help somewhat, if reputational damage is at stake. Best of all is cultivating a culture of good citizenship – abiding by the rules. The lawyers can play and often do play a critical role in writing compliance manuals and educating on compliance. Worse than corporate evasion is not having rules at all.

VI. CONCLUSION

The FTC should embrace the role it was originally given in 1914. The Commission was established to be an expert administrative agency, not confined to adjudication in court as was the Department of Justice, but set up "to maintain a constant guard over our vast and complex interstate commerce."[12] Using the FTC's power to write competition rules for Big Tech platforms would be "a new experiment on old lines," as Justice Brandeis described the FTC's original design.[13] There is no need for a new agency to take on this role.

There is one additional reason for the FTC to address Big Tech through e*x ante* rule making. As we noted above, Europe is far ahead of the U.S. in considering abuses by the Big Tech firms. With a rule-making process opened by the FTC, a natural next step is sharing ideas with the European Commission's parallel process (which Europe has invited). The U.S. would finally join the international conversation.

11 See Harry First, The Case for Antitrust Civil Penalties, 76 Antitrust L.J. 127, 162-63 (2009) (FTC and Justice Department should be given power to impose civil fines in monopolization cases).

12 Richard S. Harvey & Ernest W. Bradford, A Manual of the Federal Trade Commission 132 (1916).

13 *FTC v. Gratz*, 253 U.S. 421, 429, 434 (1920) (dissenting opinion).