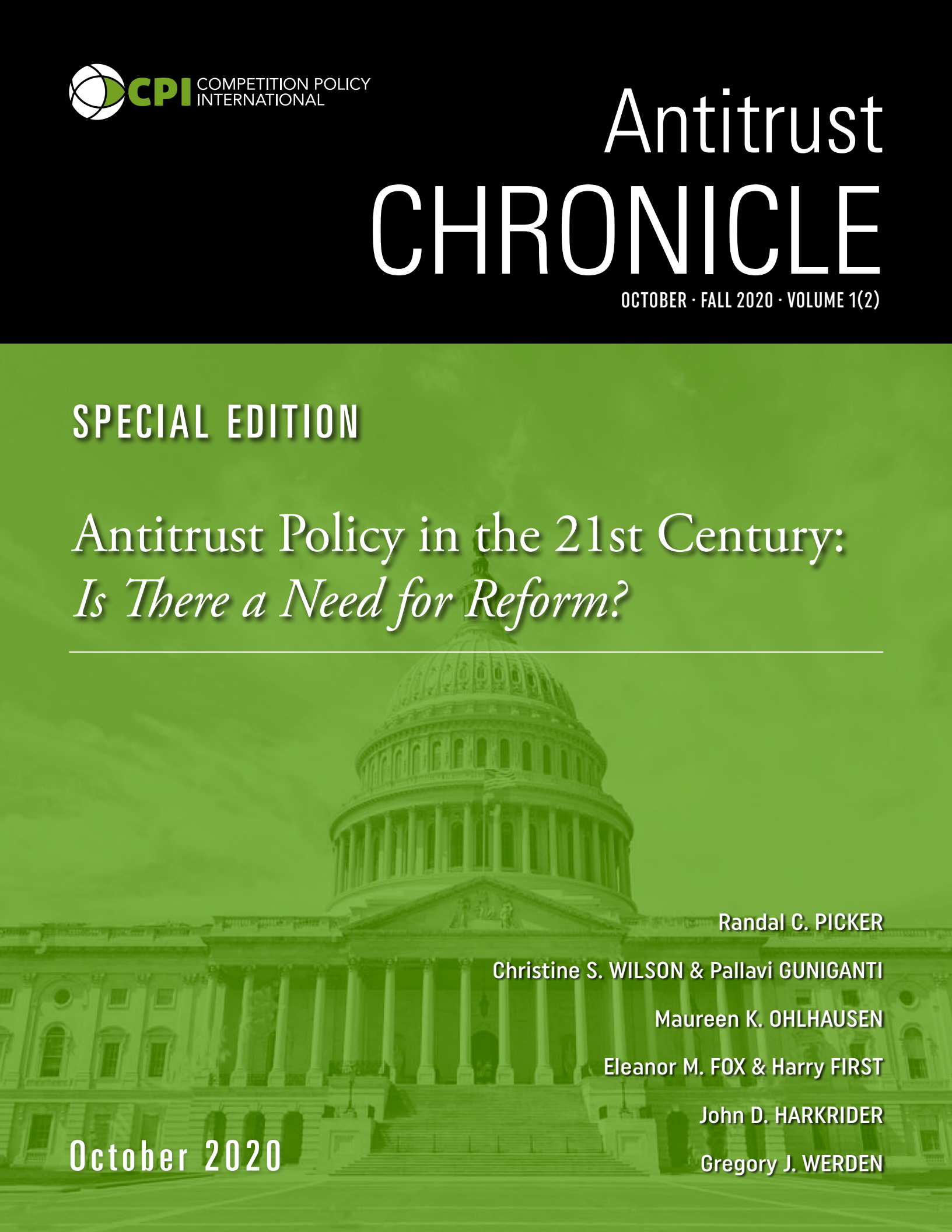
CPI COMPETITION POLICY INTERNATIONAL

Antitrust CHRONICLE

OCTOBER · FALL 2020 · VOLUME 1(2)

SPECIAL EDITION

Antitrust Policy in the 21st Century: *Is There a Need for Reform?*



Randal C. PICKER

Christine S. WILSON & Pallavi GUNIGANTI

Maureen K. OHLHAUSEN

Eleanor M. FOX & Harry FIRST

John D. HARKRIDER

Gregory J. WERDEN

October 2020

www.competitionpolicyinternational.com

With the support of:

CPI thanks the sponsors for their support with this Antitrust Chronicle. CPI always strives to deliver balanced and enriching content and conversation to benefit the antitrust community worldwide.

CPI COMPETITION POLICY INTERNATIONAL

Antitrust CHRONICLE

Antitrust Policy in the 21st Century: *Is There a Need for Reform?*

SPECIAL EDITION

Antitrust CHRONICLE

Letter from the Editor

Dear Readers,

In this special edition of the Antitrust Chronicle we feature pieces from contributors to CPI's policy roundtable sessions on "Antitrust Policy in the 21st Century: Is There a Need for Reform?" held in July of this year.

The sessions touched on several key topics facing practitioners, legislators, and enforcers as we face into the third decade of this century.

Of course, top of the agenda was the question of how antitrust rules should be enforced in the digital economy. As the reports pile up, and legislators prepare to take action, the debate continues. Some authors (such as Eleanor Fox & Harry First) take the view that a regulatory approach is required, with new ex ante rules to be set and enforced by a body such as the FTC.

Others (including John Harkrider) argue that digital markets do not merit special treatment, and antitrust rules should not be used as an excuse to punish successful firms to the detriment of innovation and consumers.

Leaving aside the question of big tech, Maureen Ohlhausen also addresses the rule of antitrust in the aftermath of COVID-19. While the antitrust rules have not required any substantial modification, we can expect to see parties increasingly invoke prospective bankruptcies as justification for mergers. While this is unsurprising, enforcers must maintain a steady hand on the tiller as the economy navigates further choppy waters.

Lastly, please take the opportunity to visit the CPI website and listen to our selection of Chronicle articles in audio form from such esteemed authors as Herbert Hovenkamp, Richard Gilbert, Nicholas Banasevic, Giorgio Monti, Alison Jones, and William Kovacic among others. This is a convenient way for our readers to keep up with our recent and past articles on the go, in the gym, or at the beach.

As always, thank you to our great panel of authors and to Professor Randy Picker for skillfully moderating these roundtables.

Sincerely,

CPI Team

CPI COMPETITION POLICY INTERNATIONAL

Summaries

What's next?

For November 2020, we will feature Chronicles focused on issues related to (1) **Data Portability**; and (2) **Collaboration Agreements.**

Announcements

CPI wants to hear from our subscribers. In 2020, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES DECEMBER 2020

For December 2020, we will feature Chronicles focused on issues related to (1) **Vertical Restraints**; and (2) **Patent Licensing**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

ANTITRUST AT THE CUSP

BY RANDAL C. PICKER[1]

1 The James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School.

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. ■

FTC FIT TO ITS PURPOSE: RESPONDING TO KOVACIC'S MARKET INVESTIGATION PROPOSAL

BY CHRISTINE S. WILSON & PALLAVI GUNIGANTI[1]

1 Christine S. Wilson is a Commissioner of the U.S. Federal Trade Commission. Pallavi Guniganti is an Attorney Advisor to Commissioner Wilson. The views expressed herein are solely those of the authors and do not necessarily reflect the views of the U.S. Federal Trade Commission or any other Commissioner.

"Antitrust policy views the government as a referee, not as the manager or star player"

– Timothy Muris[2]

"We focus more on law enforcement than on prescriptive regulation."

– Edith Ramirez[3]

The idea that "antitrust is law enforcement, it's not regulation," [4] has become a bipartisan staple of remarks delivered by chairs of the Federal Trade Commission and Assistant Attorneys General for Antitrust at the Department of Justice. Then-chairwoman Edith Ramirez noted that a statement of Section 5 enforcement policy "prescribes no detailed code of regulations for the business community at large… no such prescriptive code would be feasible or desirable in our variegated and intensely dynamic economy, which is why antitrust has always relied on a case-by-case approach to doctrinal development."[5] Much as Republican appointee Makan Delrahim speaks of "the Antitrust Division as a law enforcement agency, not a regulatory one,"[6] his Democratic predecessor William Baer said he "recoil[ed]" at the idea of antitrust being regulatory.[7]

The line between law enforcement and regulation can become blurry. For example, the Department of Justice's *ASCAP/BMI* consent decree arguably turns judges of the U.S. District Court for the Southern District of New York into price regulators. When one of the performing rights organizations cannot agree on the terms to license music to a user, either side can sue based on the antitrust consent decree, asking the "rate court" to determine reasonable rates for the use proposed. But it is the court, not the DOJ, that makes these decisions; indeed, the court at times has ruled against the DOJ's interpretation of the consent decree.[8] Even structural remedies, like the breakup of AT&T, can embroil judges in quasi-regulatory decision making for decades.[9]

This does not mean that the antitrust agencies work solely on enforcement. The FTC in particular was created with significant competition policy, advocacy and research powers. The agency provides input to federal agencies and state and local authorities regarding the competition impacts of various regulatory and legislative initiatives; through both bilateral and multilateral fora, engages in policy discussions regarding best practices for sound antitrust enforcement and provides technical assistance to new and growing antitrust enforcers; files *amicus* briefs to facilitate the development of sound case law; provides testimony and technical assistance to Congress; solicits and reviews public comments regarding rules, cases, and policies; issues advisory opinions when members of the public ask whether a proposed course of conduct may be deemed anticompetitive; promulgates guidelines that explain the agency's analytical frameworks; holds workshops, roundtables and hearings on policy issues; publishes reports that examine cutting-edge antitrust concerns; and conducts studies pursuant to Section 6(b) of the FTC Act.

Nonetheless, U.S. antitrust enforcers generally express discomfort with directly regulating competition. They want to deter, find and sue to stop anticompetitive practices and mergers, with the outcome of disputes determined by a neutral judge, rather than deciding the correct way in which different market actors should interact. This approach is driven by the recognition that market forces, rather than regulatory regimes, provide the best outcomes for consumers.

---

2 Timothy J. Muris, *Competition Agencies in a Market-Based Global Economy,* Prepared Remarks at The Annual Lecture of the European Foreign Affairs Review, Brussels, Belgium, July 23, 2002.

3 Edith Ramirez, *Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission's Next Century,* Keynote Address at George Mason University School of Law 17th Annual Antitrust Symposium, Arlington, VA, Feb. 13, 2014.

4 Makan Delrahim, *Antitrust and Deregulation*, Remarks as Prepared for Delivery at American Bar Association Antitrust Section Fall Forum, Washington, DC, Nov. 16, 2017.

5 Edith Ramirez, Address at George Washington University Law School Competition Law Center, Washington, DC, Aug. 13, 2015.

6 Makan Delrahim, Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation, Washington, DC, April 26, 2018.

7 William J. Baer, Remarks at the Global Competition Review Fourth Annual Antitrust Law Leaders Forum, Miami, Florida, Feb. 6, 2015 ("We must remember our mission. It is about effective law enforcement. I recoil at the suggestion that antitrust equates to regulation. That is not what we do. And it is not how we ought to think about what we do. Our work is to use our statutory authority to remove restraints on competition and prevent behavior or consolidation that risks limiting competition. We do not aspire to be regulators or to pick winners and losers. Instead antitrust enforcement, done right, focuses on removing impediments to competitive markets and protecting market structures that facilitate competition.")

8 *U.S. v. Broadcast Music, Inc.,* 207 F. Supp. 3d 374 (SDNY 2016).

9 *U.S. v. Western Elec. Co., Inc.,* 767 F. Supp. 308, 309 (D.DC. 1991) ("The issue before the Court in this, the most recent chapter of this antitrust case, is whether the Court should remove the restriction on information services imposed as part of the consent decree.")

Recently, however, one of the world's foremost commentators on competition issues, William Kovacic, has called for the agency to be given powers similar to those of the UK competition authority, where he is now a non-executive director. Kovacic is quite familiar with the FTC, having served as General Counsel, Commissioner, and ultimately Acting Chairman of the agency. In his submission to the House of Representatives' Committee on the Judiciary, Kovacic suggested that Congress "confer powers on the FTC to conduct market studies and obtain information necessary to allow it to carry out its functions, and investigations in the same way as the UK's Competition and Markets Authority. … This would enable to FTC to study sectoral or economy-wide phenomena and to impose remedies *regardless of whether the conditions or practices in question violate the antitrust laws."*[10]

Congress structured the FTC with an internal judicial process, unlike the CMA. The UK competition agency can issue decisions without ever going before a judge. The FTC, like many other administrative agencies in the United States, has judges who come to it through recruitment and screening by the Office of Personnel Management for the federal government. While the Commissioners can override a decision by an administrative law judge, the judge is an independent and impartial fact-finder in considering the allegations brought by agency staff. And any decision to override the ALJ's opinion can be appealed to a generalist federal appellate court. If the agency brings its case in federal district court instead of in its administrative tribunal, staff face a generalist trial judge. This structure ensures that before the FTC can mandate or prohibit conduct by the private sector, its evidence and allegations are put to the test through a judicial process.

In the U.S. context, a statute that enabled the FTC to impose unwanted remedies without traditional legal procedures, such as a finding of wrongdoing and a hearing before a neutral judge, could incur constitutional challenges. Giving an agency the sole power to force divestitures at fire-sale prices absent law violations, for example, could be found to run afoul of the Fifth Amendment. While companies in the UK may be more amenable to the market investigation process because it lets them avoid findings of violations and monetary penalties, the FTC generally does not require admissions of liability in consent decrees and rarely imposes monetary penalties in civil antitrust cases.[11]

The FTC's existing market study tool authorizes it to obtain the data and information needed to analyze the nature of competition – or lack thereof – in various industries and markets. Specifically, Section 6(b) of the FTC Act empowers the Commission to require an entity to file "reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals." Following in-depth analysis of detailed information from industry participants, the FTC is well-positioned to make informed recommendations to legislators and regulatory agencies regarding needed policy changes. Even scholars who criticize the FTC for insufficient anti-monopoly enforcement have praised 6(b) studies as a powerful tool.[12]

The agency deploys market studies frequently, and for a variety of purposes. These can range from determining whether changes to the law are necessary (as in the study of large technology companies' acquisitions that were not reported under current pre-merger notification rules[13]); to updating the FTC's knowledge of an evolving industry (as in the study of internet service providers' privacy practices in the wake of vertical integration of telecommunications companies with platforms that provide advertising-supported content[14]); to supporting the agency's competition advocacy efforts (as in the study of certificates of public advantage required by states for the provision of healthcare services, which appear to insulate anticompetitive transactions from merger challenges[15]).

10 Alison Jones & William E. Kovacic, "The Institutions of U.S. Antitrust Enforcement: Comments for the U.S. House Judiciary Committee on Possible Competition Policy Reforms," April 17, 2020 (emphasis added).

11 The FTC may seek disgorgement of ill-gotten gains, but this is an equitable remedy and, in the U.S. legal context of frequent antitrust class actions, can be a substitute for money that would have been obtained by private plaintiffs anyway. See, e.g., "Cardinal Health Agrees to Pay $26.8 Million to Settle Charges It Monopolized 25 Markets for the Sale of Radiopharmaceuticals to Hospitals and Clinics; Under Settlement, Money to Be Deposited Into a Fund for Distribution to Injured Customers," April 20, 2015. Although the FTC in 2012 withdrew the Policy Statement on Monetary Equitable Remedies in Competition Cases that was issued in 2003, the agency still considers the factors outlined in the policy – including whether private plaintiffs could obtain monetary remedies – when determining whether to seek disgorgement.

12 See, e.g. Ganesh Sitaraman, *Taking Antitrust Away from the Courts: A Structural Approach to Reversing the Second Age of Monopoly Power* (Sept. 2018) ("How do we know if an industry is overly concentrated? How do we know where exclusionary and anticompetitive practices are taking place? In the early 20th century, the answer was simple: the FTC conducted industry-wide investigations. These were in-depth investigations using the FTC's section 6b powers to identify and expose competitive and market power problems in industry.")

13 Press Release, FTC to Examine Past Acquisitions by Large Technology Companies; Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp., Feb. 11, 2020.

14 Press Release, FTC Seeks to Examine the Privacy Practices of Broadband Providers, March 26, 2019.

15 Press Release, FTC to Study the Impact of COPAs, Oct. 21, 2019 ("The Federal Trade Commission issued orders to five health insurance companies and two health systems to provide information that will allow the agency to study the effects of certificates of public advantage (COPAs) on prices, quality, access, and innovation of healthcare services. The FTC also intends to study the impact of hospital consolidation on employee wages.").

Some may view as a shortcoming the FTC's inability to impose changes directly on a market following a 6(b) study. But the FTC's history features powerful instances of beneficial outcomes of the 6(b) process – without turning the agency into a competition regulator. For example, the Commission in October 2000 gave notice of the orders under Section 6(b) that it would serve on brand name pharmaceutical companies and generic drug makers. The resulting 2002 report on "Generic Drug Entry Prior to Patent Expiration" recommended legislative and regulatory changes to Congress and the Food and Drug Administration, respectively, which both entities implemented.16 Rather than setting itself up as a rival to the FDA, the FTC thanked the pharmaceutical regulator for its contributions in the preparation of the report and advised the FDA that anticompetitive conduct the FTC had challenged was far from atypical.[17]

Conversely, the Commission's 2011 report on "Authorized Generic Drugs: Short-Term Effects and Long-Term Impact" provided an empirical basis for not imposing a prohibition on such drugs. It resulted from a 6(b) study that was requested by a bipartisan trio of senators.[18] Understanding the effect of statutes and regulations on competition can be difficult – especially in sectors already overlaid with complex legal rules – without facts that the companies involved may be unwilling to disclose in the absence of compulsory process.[19] The FTC report delivered complex conclusions: the introduction of an authorized generic version of a branded drug can reduce prices, but by lowering expected profits it theoretically could affect whether a generic drug maker would bother to challenge patents on drugs with low sales – yet empirically, patent challenges by generic competitors remained robust. Legislation to remove the theoretical disincentive – by banning introduction of an authorized generic while a generic competitor's FDA application was pending and during the 180-day exclusivity period – died in both houses of Congress.[20] Instead of a blanket market regulation that might have deprived consumers of some of the benefits of authorized generics, pharmaceutical companies face targeted antitrust enforcement by the FTC.[21]

Short of the 6(b) process, the FTC can analyze market dynamics and recommend alterations to legislation and regulations to enhance competition. Along with the DOJ, the FTC in February 2002 convened 24 days of hearings about the proper balance of competition and patent law and policy. The information gleaned from more than 300 panelists from large and small businesses, the independent inventor community, patent and antitrust organizations, and relevant legal and economics scholars, as well as 100 written submissions, provided a basis for the FTC report's recommendations.[22] Again, rather than setting itself up as a rival to a regulator, the FTC sought to increase communication with patent institutions: filing *amicus* briefs in important patent cases that can affect competition, asking the Patent and Trademark Office director to reexamine questionable patents that raise competitive concerns, and recommending the establishment of a Liaison Panel between the antitrust agencies and the PTO and an Office of Competition Advocacy within the PTO.

These examples illustrate the power of FTC's competition advocacy – and the impact that the FTC can have, within its appropriately circumscribed place in a modern system of government that does not lack for regulators. Going beyond this role would make the FTC a star player in the market instead of a referee.

The CMA's market investigation tool, like the FTC's 6(b) authority, enables the agency to subpoena information from market participants to facilitate an analysis of the industry's market dynamics. But the similarities between the CMA's market investigation tool and the FTC's 6(b) authority end there, because the CMA is also empowered to intervene in situations in which there are "features of a market" that cause an "adverse effect on competition." Kovacic has described the CMA market investigation as a "more substantial" kind of market study, one that

16 Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

17 Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration (July 2002).

18 Federal Trade Commission, Authorized Generic Drugs: Short-Term Effects and Long-Term Impact (August 2011); Notice: Authorized Generic Drug Study: FTC Project No. P062105, 71 Fed. Reg. 16,779 (April 4, 2006); Press Release, Grassley, Senators Request Study on Impact of "Authorized" Generics, May 12, 2005 ("It has come to our attention that the practice of 'authorized' generic drugs may produce anti-competitive results and, thus, present an issue worthy of study by the Federal Trade Commission.").

19 Transcript, Federal Trade Commission: Into Our 2nd Century, p. 156 (July 29, 2008) (quoting Susan DeSanti: "lots of people had been lobbying on the Hill for two years about whether authorized generics were good for competition or bad for competition. Nobody was coming forth with the facts about this because it was all proprietary data. Congress would like to know because they wanted to know whether the current provision, which allows authorized generics, was causing yet another problem for generic competition.").

20 112th Congress, H.R. 741 and S. 373.

21 Press Release, FTC Concludes that Impax Entered into Illegal Pay-for-Delay Agreement, March 29, 2019 ("The Commission found that Endo possessed market power in the market for branded and generic oxymorphone ER. The Commission found that Impax received a large and unjustified payment, which included: (1) a 'No AG' commitment, i.e., a promise from Endo not to launch an authorized generic during the 180-day exclusivity period that the Hatch-Waxman Act provides to the first generic filer; and (2) an additional credit that Endo would pay Impax in the event the market for Opana ER declined before Impax's entry date.")

22 Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (Oct. 2003).

"goes beyond persuasion as a mechanism for reform and gives the competition agency power to implement remedial measures to correct deficiencies identified in the agency's inquiry."[23] The Enterprise Act of 2002, as amended by the Enterprise and Regulatory Reform Act 2013, gave this tool to the CMA's predecessor agency, the Competition Commission, and since then the UK competition authority has undertaken 19 market investigations.

The context in which the Competition Commission obtained this power highlights a difference from the U.S.'s history of antitrust as law enforcement. The UK government in July 2001 proposed that decisions should be taken primarily by the competition agencies based on their mandate to stop the prevention, restriction or distortion of competition.24 This proposal constituted a significant move away from the public interest test in the Fair Trading Act 1973, which entailed frequent involvement by the Secretary of State.[25] In other words, the UK gave its competition authority a market investigation tool as a liberalizing reform of a prior regime in which a non-antitrust government actor regulated markets.

The CMA has said the market investigation tool is not "a self-standing solution," but rather "a valuable complement" to competition enforcement – which can result in civil or criminal penalties – and direct regulation.[26] At the same time, the agency acknowledges that "where the Orders arising from MIs are behavioral (which is often the case), they effectively constitute a form of ex ante regulation." According to the CMA, this tool enables the agency

> to look holistically at and intervene (where appropriate) to address a range of different possible features of markets (be they conduct and/or structural) which may be creating competition issues that negatively impact consumers. Examples of these are demand and/or supply-side behavior, barriers to entry and expansion by firms, switching difficulties by customers, and regulatory restrictions. An MI is particularly helpful in circumstances where each of these features or a combination of them may have evolved in such a way as to impede the competitive process and the effective functioning of that market, without any one or more firms breaking any particular competition or consumer laws.[27]

A market investigation does not require the CMA to find dominance, much less any violation of existing laws, before imposing forward-looking, market-wide remedies. While the CMA consults with relevant stakeholders and its remedies are subject to judicial review, it does not have to reach a consensus with businesses or obtain a ruling from an independent decisionmaker before it requires them to alter their conduct. Based on market investigations, the CMA has introduced a data portability regime in the banking sector, created a Grocery Code to limit certain types of provisions in agreements between food producers and retailers, and required divestitures in the aggregate and airport markets.

As Kovacic notes, "In the United Kingdom, the market studies mechanism also permits the dissolution of concentrated market positions that owe their existence to public policies that have created or maintained positions of dominance."[28] For example, the airports investigation found a lack of competition among the seven UK airports owned by the British Airports Authority, which had been a government entity responsible for state-owned airports but was privatized under Margaret Thatcher in 1986. The Competition Commission in 2009 concluded that BAA must divest both London-area Stansted and Gatwick Airports to different purchasers, and either Edinburgh or Glasgow Airport in Scotland.29 This example highlights another difference between the histories of market regulation in the UK and the US. Because the U.S. government rarely owned companies, it never went through a privatization phase like the UK's of state-owned British Airways, British Rail, British Telecom, Britoil, British Gas, etc.[30]

---

23 William E. Kovacic, "Market structure and market studies," in Competition Law and Economics: Developments, Policies and Enforcement Trends in the US and Korea, ed. Jay P. Choi, Wonhyuk Lim & Sang-Hyop Lee (2020).

24 Department of Trade and Industry, "A World Class Competition Regime" (July 2001).

25 Richard Whish, Competition Law, 5th ed., p. 411.

26 Competition and Markets Authority, "The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool" (September 14, 2020).

27 *Id.*

28 See *supra* note 11.

29 Competition Commission, *A report on the supply of airport services by BAA in the UK*, March 19, 2009. The Commission also imposed behavioral remedies regarding quality of service at Heathrow, and disclosure and consultation with stakeholders on capital expenditures at Aberdeen. It further made recommendations to the Department for Transport on economic regulation of airports.

30 Perhaps the closest U.S. equivalent of the privatization push under Thatcher in the UK was the deregulatory movement of the late 1970s and 1980s. However, the United States, with a land mass 40 times the size of the UK's, arguably has been *more* inclined to have the federal government run services that might not survive on a nationwide basis in the private sector: passenger rail (compare Amtrak to the privatization of British Rail and multiple competing private rail companies) and postal service (compare the U.S. Postal Service to the Royal Mail – founded by Henry VIII and now a company traded on the Exchange).

The majority of UK market investigation remedies have been behavioral in nature. This type of remedy obligates the relevant authority to expend significant resources monitoring companies' compliance, engaging with the companies regarding application of the remedies in nuanced situations and as market dynamics evolve, and enforcing them as appropriate. "This can be costly and time-consuming relative to the resources typically available within agencies," the CMA acknowledges.[31] With the behavioral remedies effectively functioning as *ex ante* regulation, in markets that are overseen by sectoral regulators, this work "can potentially be passed to the [sectoral] regulator to be carried out alongside other monitoring and enforcement activity."[32] This is an admission that regulation of this type does not fall within the domain of antitrust agencies and is more appropriately undertaken by sectoral regulators.

Congress intended the FTC to function as an expert agency that could advise regulators, not act in their place. Indeed, the statutory carve-outs from the FTC's authority to enforce against unfair methods of competition – banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and entities subject to the Packers and Stockyards Act – are based on the sectors that, at the time of legislation, already were being extensively regulated by other federal or state agencies.

Such market regulation can pose its own problems, as demonstrated by the output- and innovation-stifling rules formerly imposed on transportation networks.[33] But giving the FTC the power to regulate rather than enforce competition in markets is likely to create conflicts with existing sectoral regulators. Currently, the FTC's advisory role enables it to support other agencies in efforts to increase competition, rather than potentially clashing with them.[34] Where a sector already has a regulator, unless that regulator is so captured as to be useless, it may be better for the FTC to provide its competition expertise to encourage that sectoral regulator to act in ways that minimize market distortions and maximize benefits to consumers.

Admittedly, competition advice can take time to have effect. For example, the FTC during the 1980s aggressively pushed for more competition in taxi services, which are regulated at the state or local level, often through licensing regimes that control entry. In addition to making 18 advocacy filings with various local authorities from 1984 through 1989, the FTC sued two cities in 1984, accusing each of combining with incumbent taxi operators to impose regulations that limited licenses and increased fares. While the FTC withdrew its complaint against Minneapolis after the city amended its law to be more pro-competitive, the lawsuit against New Orleans had to be dropped due to the state action doctrine when Louisiana authorized the city's conduct. As of 2007, the FTC deemed its "major contribution" toward deregulation to be a 1984 Bureau of Economics staff report on taxicab regulation, which concluded that restrictions on entry appeared to be unnecessary.[35]

"As of 2007, the general description of the taxicab industry and taxicab regulation in the United States remains much as it was when Frankena and Pautler described it in 1984. That is, nothing dramatic has happened to alter the U.S. industry in the interim," the FTC said then.[36] But dramatic change would soon arrive through software applications on smartphones, which enabled not only incumbent taxi operators to find customers more readily, but also new entrants who lacked taxi licenses. Drawing on its prior expertise regarding unnecessary restrictions in the taxi industry, the FTC in 2013 began commenting on regulatory proposals to allow the development of these new vehicle-for-hire services.[37] These comments to sectoral regulators in Colorado, Anchorage, Chicago and Washington, DC were all at least partially successful, as the relevant authorities opted to permit more entry into the market.

Had the FTC been empowered to structure vehicle-for-hire markets across the U.S. in the absence of any antitrust violation, it might not have had to wait for a technological shift to force regulators to rethink stale rules. But its remedies arguably would

---

31 See *supra* note 14.

32 *Id.*

33 Christine S. Wilson & Keith Klovers, T*he growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, Journal of Antitrust Enforcement, Vol. 8, Issue 1, March 2020, pp. 10–29, https://doi.org/10.1093/jaenfo/jnz029 (describing how replacing free markets with regulatory regimes imposes significant harm to consumers and noting that Congress phased out the Interstate Commerce Commission and the Civil Aeronautics Board as the deadweight losses of the agencies' efforts to structure transport markets became apparent).

34 For example, the FTC was closely involved with "Reforming America's Healthcare System Through Choice and Competition," a report submitted by the Departments of Health and Human Services, Treasury and Labor to President Donald Trump in December 2018. Several of the proposals–reforming state certificate-of-need and certificate of public advantage laws, reducing licensing barriers, boosting telemedicine–have long been advocated by the FTC on a bipartisan basis.

35 United States submission to Working Party No. 2 of the OECD Competition Committee, Taxi Services Regulation and Competition, Sept. 27, 2007 (citing Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* (May 1984), available at https://www.ftc.gov/sites/default/files/documents/reports/economic-analysis-taxicab-regulation/233832.pdf).

36 *Id.*

37 Note by the United States to Working Party No. 2 of the OECD Competition Committee, Taxi, Ride-Sourcing and Ride-Sharing Services, May 25, 2018.

have lacked the democratic legitimacy of the local taxi authorities' decision-making. The persuasive force of competition advocacy lacks the faster gratification of imposing remedies upon spotting a market imperfection, but it preserves sectoral regulators' role in accounting for preferences beyond competition.

Too often, regulation results in harm to consumers because it distorts markets. Even assuming it is appropriate at the time it is first implemented (a big assumption), regulation frequently becomes stale as markets evolve and ends up inhibiting innovation; frequently becomes more expansive as market dynamics are better understood; and frequently ends up protecting competitors – especially incumbents who adapt to regulation and lobby the regulator – rather than competition.[38] Nonetheless, if market failures require government intervention through regulation, sectoral regulators are better-placed than a competition authority. The FTC's specific missions and existing tools have shaped its ability to enforce competition and consumer protection laws while making recommendations to the appropriate fora for changes in laws and regulations.[39]

38 See *supra* note 21 (describing how the Interstate Commerce Commission's mandate started with railroads but expanded to railroads' competitors in trucking and then barges, which compete with both; and how the ICC and Civilian Aeronautics Board refused to authorize route entry based on concerns about harms to competitors).

39 See Randal C. Picker & Dennis W. Carlton, Antitrust and Regulation, Working Paper 12902 (Feb. 2007), at 51 ("Regulation and antitrust are two competing mechanisms to control competition. The early history in which special courts were established and then abolished, and in which the FTC was created illustrate this point. The relative advantages and disadvantages of each mechanism became clearer over time. Regulation produced cross-subsidies and favors to special interests, but was able to specify prices and specific rules of how firms should deal with each other. Antitrust, especially when it became economically coherent within the past 30 years or so, showed itself to be reasonably good at promoting competition, avoiding the favoring of special interests, but not good at formulating specific rules for particular industries."), available at http://www.nber.org/papers/w12902.pdf.

ANTITRUST IN TIMES OF CRISIS

BY MAUREEN K. OHLHAUSEN[1]

1 Partner, Baker Botts, Washington, DC.

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

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-

---

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.

WE NEED RULES TO REIN IN BIG TECH

BY ELEANOR M. FOX & HARRY FIRST[1]

1 Eleanor M. Fox is Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. Harry First is Charles L. Denison Professor of Law at New York University School of Law.

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).

THERE BUT FOR THE GRACE OF GOD

BY JOHN D. HARKRIDER[1]

1 John D. Harkrider is a partner at Axinn, Veltrop & Harkrider LLP. The author represents Google and would like to thank Melanie Kiser for her invaluable research assistance.

I. INTRODUCTION

The recent hearings on digital markets rest upon the assumption that these markets exhibit unique attributes that the current version of the antitrust laws cannot address. Specifically, proponents of revising the antitrust laws argue first, that there are unique competitive issues with digital markets that are likely to entrench dominant firms and retard innovation;[2] second, that digital markets are not behaving in a competitive manner; and third, the antitrust laws should be modified to deal with the unique issues in these markets.

Even a cursory review reveals flaws in these propositions. Many markets have high levels of concentration, economies of scale and scope, and network effects. There is no evidence that digital markets have less competition than these markets. To the contrary, there is not only significant entry in digital markets, but these markets show significant research and development ("R&D") investment that is inconsistent with the existence of monopoly power.

Most importantly, there is no evidence that the antitrust laws must be modified to deal with the so-called unique issues in digital markets. To the contrary, modification is most likely to retard innovation and investment in digital markets, making it potentially easier for less innovative and lower quality competitors to compete.

II. DIGITAL MARKETS ARE NOT UNIQUE

It argued that there are six distinctive features of digital markets that justify new digital market regulators and legislation:[3]

1. Zero monetary price
2. Limitation to switching and multihoming,
3. Importance of data,
4. High levels of concentration,
5. Economies of scale and scope, and
6. Network effects.

But these statements are either not true or not unique.

It is not true that zero monetary price increases barriers to entry. When access is free, it is costless for customers to both multi-home and switch. As David Evans has explained:

> People find it generally easy, and often costless, to use multiple online platforms, and many often do. The ease and prevalence of multihoming have enabled new firms, as well as cross-platform entrants, to attract significant numbers of users and secure critical mass necessary for growth. Incumbent platforms then face serious competitive pressure from new entrants—startups or other online platforms—because their network effects are reversible.[4]

Indeed, it is not uncommon for individuals to be customers of Instagram, Snapchat, TikTok, and YouTube, all of which are free services. 85 percent of teens use Instagram, 82 percent use Snapchat, 62 percent use Tiktok, which would be impossible without significant multihoming and switching.[5]

As the Department of Justice ("DOJ") has recognized, multihoming is one of the numerous "constraint[s] on platforms. … All else equal, multi-homing occurs more often when the cost of adopting an additional platform is low, and is especially common in zero-price markets. ...

---

2 See e.g. Press Release, David N. Cicilline, Congressman, *Judiciary Committee Launches Investigation into Competition in Digital Markets* (June 3, 2019), https://cicilline.house.gov/press-release/judiciary-committee-launches-investigation-competition-digital-markets ("'Market power in digital markets presents a whole new set of dangers,' said Antitrust Subcommittee Chairman David N. Cicilline (D-RI)."); *id.* (quoting Antitrust Subcommittee Ranking Member Jim Sensenbrenner, "As the world becomes more dependent on a digital marketplace, we must discuss how the regulatory framework is built to ensure fairness and competition"); Sen. Amy Klobuchar, Transcript of Senate Judiciary Committee Antitrust Subcommittee Hearing (Sept. 15, 2020) ("[T]his could be the beginning of a reckoning for our antitrust laws to start looking how we're going to grapple with the new kinds of markets that we see across our country.").

3 See Jason Furman et. al., *Unlocking Digital Competition, Report of the Digital Competition Expert Panel* (mar. 2019) ¶ 1.20. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (hereinafter "Furman Report").

4 David S. Evans, *Why The Dynamics Of Competition For Online Platforms Leads To Sleepless Nights, But Not Sleepy Monopolies,* SSRN (Aug. 23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

5 *TikTok's Already the 3rd Favorite Social Platform Among US Teens*, MARKETING CHARTS (April 27, 2020), https://www.marketingcharts.com/digital/social-media-112790 (citing Piper Sandler's biennial Taking Stock With Teens survey, conducted in fall 2019, https://www.statista.com/chart/22446/most-used-social-media-platforms-by-us-teens/#:~:text=According%20to%20the%20survey%20conducted,and%2036%20percent%20for%20Facebook).

Multi-homing occurs in zero-price markets because they are often highly differentiated."[6]

Furthermore, zero monetary price to users is not unique to digital markets and has existed for decades or more.[7] Common historical examples include broadcast radio (since the 1920s); broadcast television; shopping malls, zero-price weekly newspapers; and the old Yellow Pages.[8] Take broadcast television stations as an example. All had zero monetary price to users, and yet there was no barrier either to multi-homing, or to entry by subscription services offered by cable companies.

Zero monetary pricing is also observed outside platforms markets, including, for example: "the supply of complementary products and services; the so-called 'freemium' model, in which a supplier offers a free version as well as a higher quality paid-for version [e.g. Dropbox]; [and] short-term strategies (e.g. promotions)."[9] As the DOJ has explained: "Zero-price strategies … may enable new entrants to break into markets, increasing competition and consumer choice. Firms in zero-price markets often compete on quality and innovation, which can benefit consumers."[10]

It is also not true that data is more important in digital platforms than in other markets or that digital platforms have unique access to data. Take gaming, where Microsoft, Sony, and Nintendo collectively have nearly 100 percent of the gaming console market,[11] and where Unity provides the engine for more than 50 percent of mobile games.[12] There is no question that these firms have important and valuable data on what their users like. Take electric cars, where Tesla has an 81.66 percent market share and presumably has more information on electronic battery performance than its rivals.[13] Take a company like Illumina. They have nearly 90 percent of the Next Generation Sequencing ("NGS") market in the United States,[14] and an estimated 80 percent globally.[15] They have more access to data on how to improve their NGS than other competitors in the market.

It is also not true that digital markets are inordinately concentrated. Altria and Reynolds have more than 80 percent of cigarette and tobacco manufacturing in the United States.[16] Intel, Samsung, and Micron have over 80 percent of semiconductor and circuit manufacturing.[17] Four airlines have 80 percent of the market.[18] Home Depot and Lowe's control 90 percent of the home improvement store market.19 Mars and Hershey

---

6 Makan Delrahim, U.S. Department of Justice, "I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy, at 13-14, https://www.justice.gov/opa/speech/file/1131006/download (hereinafter "'I'm Free' Speech").

7 See *id.* at 2 ("the strategy of selling a product or service at zero price is not new, nor is it unique to the digital economy.").

8 Davis S. Evans, *The Antitrust Economics of Free*, University of Chicago Law School Chicago Unbound (2011), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1483&context=law_and_economics.

9 DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, OECD at 2 (Nov. 28, 2018), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/quality_considerations_in_digital_zero-price_markets_united_states.pdf (internal citations omitted).

10 "I'm Free" Speech, *supra* note 6 at 7.

11 Nav Patel, PS4 *vs XBox One vs Switch: Console and Game Sales Numbers - 2019*, HOOKED ON TECH (Mar. 30, 2019), https://hookedontech.com/ps4-vs-xbox-one-vs-switch-console-and-game-sales-numbers-2019/

12 Romain Dilet, *Unity CEO says half of all games are built on Unity,* Tech Crunch (Sept. 5, 2018), https://techcrunch.com/2018/09/05/unity-ceo-says-half-of-all-games-are-built-on-unity/

13 Anand Gupta, *Why a New Crop of Electric SUV Batteries are Coming up Short*, EQ INTERNATIONAL (April 9, 2019), https://www.eqmagpro.com/why-a-new-crop-of-electric-suv-batteries-are-coming-up-short/; Fred Lambert, *Tesla holds 80% of US EV market despite losing federal tax credit*, ELECTREK (Aug. 21, 2020), https://electrek.co/2020/08/21/tesla-holds-us-ev-market-losing-federal-tax-credit/#:~:text=According%20to%20data%20gathered%20by,the%20first%20half%20of%202020.

14 Compl.¶1, I*llumina, Inc. & Pacific Biosciences of California, Inc.*, F.T.C. Case No. 9387 (Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf (hereinafter "Illumina complaint").

15 Maxx Chatsko, *What Happens Next for Illumina and Pacific Biosciences?*, Motley Fool (Dec. 28, 2019), https://www.fool.com/investing/2019/12/28/what-happens-next-for-illumina-and-pacific-bioscie.aspx ("Illumina boasts an 80% market share of the global next generation sequencing (NGS) market, making it the undisputed king of reading genomes.").

16 CIGARETTE & TOBACCO MANUFACTURING IN THE US - MARKET RESEARCH REPORT, IBISWORLD (May 15, 2020); see also Marisa Lifschutz, *Top 5 Highly Concentrated Manufacturing Industries*, IBISWORLD INDUSTRY INSIDER (May 2, 2019), https://www.ibisworld.com/industry-insider/analyst-insights/top-5-highly-concentrated-manufacturing-industries/.

17 *Id.*

18 *Monopoly by the Numbers,* Open Markets, https://www.openmarketsinstitute.org/learn/monopoly-by-the-numbers

19 CLAIRE O'CONNOR, HOME IMPROVEMENT STORES IN THE US, IBISWORLD (June 2020).

control nearly 75 percent of the chocolate market.[20] Visa, MasterCard, and American Express have virtually 100 percent of the credit card market.[21]

Many of these markets also have scale and scope economies and network effects. The more people who use Illumina's NGS platform, the more applications are built for Illumina sequencers, the more people use Illumina's NGS platform. The same is true for gaming, credit cards, and countless other alternatives. Should these companies be regulated? Should the antitrust laws be altered for them as well?

III. NO EVIDENCE THAT DIGITAL MARKETS ARE NOT COMPETITIVE

Digital markets are characterized by several indicators of competitive markets. For example, digitally-focused companies led the world in R&D spending by public companies for 2018, with Amazon and Google spending the most, Microsoft and Apple in the top ten, and Facebook in the top fifteen, above pharmaceutical giant Pfizer.[22] Apple's R&D spending has grown from $1 billion in 2009 to an estimated $13 billion in 2019, an amount some observers say "illustrates Apple's push to keep up with new rival technologies and to innovate in new categories."[23]

Amazon has surpassed Google as the leader in product searches, growing from 46 percent to 54 percent of searches between 2015 and 2018, while Google declined.[24] Among Amazon Prime subscribers, 74 percent report starting their searches on Amazon.[25] Nearly 90 percent of Amazon's product views now come from its own product search features,[26] and its revenues for advertising against those searches have been growing significantly, increasing 40 percent year-over-year as of Q4 2019.[27] There is no question that Amazon's share of search advertising is growing faster than Google's business.

Snapchat reaches more 13 to 24-year olds than Facebook or Instagram in the United States, United Kingdom, France, Canada, and Australia, reaching nearly 90 percent of Americans in this demographic and 75 percent of those aged 13 to 34.[28] Snapchat has 238 million daily active users, up 17 percent year-over-year as of July 2020, with steady quarterly growth.[29]

TikTok has grown 800 percent since January 2018 with approximately 100 million monthly active users in the United States as of August 2020. About half of these users are engaged daily.[30] Globally, TikTok has grown to 689 million monthly active users as of July 2020.[31]

Google's share of digital advertising has declined steadily over the past four years, from 40.8 percent in 2016[32] to 29 percent

---

20 *North America Chocolate Market - Growth, Tends, and Forecasts (2020-2025)*, Mordor Intelligence, https://www.mordorintelligence.com/industry-reports/north-america-chocolate-market.

21 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

22 Furman Report, *supra* note 3 (citing PwC 2018 Global Innovation 1000 study).

23 *Apple's R&D Spending Goes from $1B to $13B in 2019*, PYMTS.com (May 17, 2019), https://www.pymnts.com/apple/2019/research-development-spending-innovations/.

24 Press Release, Jumpshot, Jumpshot Releases State of eCommerce Data Report that Reveals New Retails Strategies for Sponsored Search, Affiliate Marketing and Influencers (May 16, 2019),https://www.prnewswire.com/news-releases/jumpshot-releases-state-of-ecommerce-data-report-that-reveals-new-retail-strategies-for-sponsored-search-affiliate-marketing-and-influencers-300851315.html (hereinafter "Jumpshot State of eCommerce Report"); see also *Do Most Searches Really Start on Amazon?*, EMARKETER (Jan. 7, 2020), https://www.emarketer.com/content/do-most-searchers-really-start-on-amazon.

25 Laurnie Wilson, *Most Americans Still Start Product Searches on Amazon Before Google*, CIVIC SCIENCE (May 20, 2020), https://civicscience.com/most-americans-still-start-with-amazon-before-google-for-product-searches.

26 Jumpshot State of eCommerce Report, *supra*, note 25.

27 Ginny Marvin, *Amazon's Booming Ad Business Grew by 40% in 2019*, MARKETING LAND, https://marketingland.com/amazons-booming-ad-business-grew-by-40-in-2019-275312

28 Josh Constine, *Snapchat launches Scan, its AR utility platform*, TECH CRUNCH, https://techcrunch.com/2019/04/04/snapchat-scan-platform/; Transcript of Snap Inc at JPMorgan Technology, Media and Communications Conference (Virtual), NewsRoom (May 12, 2020).

29 Transcript of Snap Inc. Q2 2020 Earnings Call (July 21, 2020), https://s25.q4cdn.com/442043304/files/doc_financials/2020/q2/snap-inc-q2-2020-earnings-transcript-v1.pdf.

30 Alex Sherman, *TikTok Reveals Detailed User Numbers For the First Time*, CNBC (Aug. 24, 2020), https://www.cnbc.com/2020/08/24/tiktok-reveals-us-global-user-growth-numbers-for-first-time.html.

31 *Id.*

32 *Facebook* vs. Google Share of Total US Digital Ad Spending*, EMARKETER, https://www.emarketer.com/chart/217028/facebook-vs-google-share-of-total-us-digital-ad-spending-2016-2020-of-total-digital-ad-spending.

in 2020, even as the overall market has grown.[33] Even before the pandemic, Google's share had declined to 36.3 percent in early 2020.

One cannot seriously argue that there is less entry in digital markets than in other markets that are not subject to special rules. For example, name an entrant in automobiles in the last 50 years with more than a 5 percent share. Or name a new credit card company with more than a 5% share, new significant tobacco company, new significant daily urban newspaper, new significant broadcast television station, new significant cable company, new significant oil and gas company. You can't.

IV. CONCLUSION

Most of Google's complainants are not consumers or even small competitors. They are incumbent dominant firms who own once-monopolistic daily newspapers (NewsCorp), cable companies (Comcast who owns Freewheel), and phone companies (AT&T who owns AppNexus). They hate technology companies that reduce prices and improve product quality for the same reason all competitors hate these things.

These large firms want nothing more than to saddle innovative technology companies with the heavy hand of regulation, hoping that such regulation will retard the innovation and investment of technology companies.

But these firms are not alone. They have joined with frequently well-intentioned academics who have an ambitious goal that extends far beyond technology firms. The basic premise of these academics is that the United States has a widespread "monopoly problem" that far extends beyond digital markets.[34] These critics have long maintained that the antitrust laws must be altered to deal with this alleged problem.

Concerns like income inequality and equal opportunity are important in their own right as are concerns over privacy and data protections. These concerns should not be manipulated by dominant firms to deprive consumers of the many benefits of technology - free, high quality, innovative products. Especially when the very firms who are complaining want nothing more than to charge consumers for the very products that technology companies are frequently providing to consumers for free.

In the end, the focus on digital platforms should not be understood as a narrowly tailored focus on the unique attributes of these platforms, but rather should be seen as the first in what is likely to be a widespread effort to reform the antitrust laws that have so far incentivized firms to innovate and grow. The tech firms are the first, but not the last firms by any stretch of the imagination. And this should be concerning to any successful firm with a great product that consumers love and competitors hate. After all, the next hearings most certainly will be about how non-technology companies' need to let regulators and politicians redesign their products and share their data and innovations with rivals.

33 Brad Adgate, In *A First, Google Ad Revenue Expected To Drop In 2020 Despite Growing Digital Ad Market*, FORBES (June 22, 2020), https://www.forbes.com/sites/bradadgate/2020/06/22/in-a-first-google-ad-revenue-expected-to-drop-in-2020-despite-growing-digital-ad-market/#76aabe44607d;

34 See, e.g. Joseph Stiglitz, *America Has a Monopoly Problem--and It's Huge*, THE NATION (Oct. 23, 2017), https://www.thenation.com/article/archive/america-has-a-monopoly-problem-and-its-huge/.

FTC v. QUALCOMM: THE SKY IS NOT FALLING

BY GREGORY J. WERDEN[1]

1 The author retired in 2019 from his position as Senior Economic Counsel, Antitrust Division, U.S. Department of Justice. The Department supported Qualcomm in the Ninth Circuit. Since retirement, the author has not acted on behalf of any interested party.

The majority staff of the House Subcommittee on Antitrust, Commercial and Administrative Law recently published detailed allegations of anticompetitive conduct against four tech giants — Amazon, Apple, Facebook, and Google.[2] The antitrust cognoscenti might be reminded of the 50th Congress, when the House Committee on Manufacturers published hearings on four industrial giants — the Cotton Bagging Trust, the Standard Oil Trust, the Sugar Trust, and the Whisky Trust. Senator John Sherman followed up with his anti-trust bill on the first day of next Congress, and after extensive revision, the Sherman Act became law on July 2, 1890.[3]

Many of the reforms suggested by the majority staff would be difficult to legislate, and no bill will be ready when the next Congress convenes. Moreover, the meaning of new antitrust legislation could take generations to work out and might not end up as intended. The full impact of the Foreign Trade Antitrust Improvements Act of 1982 is not yet known, but it has been read to strip federal antitrust law of a damages remedy when a foreign cartel fixes prices on a component of a consumer product assembled abroad.[4] Adding the offense of abuse of dominance, as the staff suggests, would have a totally unpredictable impact.

The majority staff aspires to negate many antitrust rules articulated by Supreme Court over the past half century, but the staff does not acknowledge the intractable problem that a judge always can find a way to stymie antitrust plaintiffs. To many, the Ninth Circuit's *Qualcomm* decision fit that troubling pattern,[5] but I think not. The court kept antitrust in its lane when the FTC sought to reduce Qualcomm's patent royalties,[6] and the court reasonably held that the FTC failed to demonstrate harm to competition.

Before trial, Judge Lucy H. Koh effectively held that one of Qualcomm's licensing practices was in breach of contract.[7] After trial, Judge Koh issued an antitrust liability opinion containing a section titled "Qualcomm's Royalty Rates Are Unreasonably High"[8] and referring to Qualcomm's "unreasonably high royalty" 70 times. But antitrust law neither derogates patent rights nor regulates patent royalties: "The patent laws . . . are *in pari materia* with the antitrust laws and modify them *pro tanto*,"[9] and the patent laws say a "patentee may grant a license to make, use and vend articles under the specifications of his patent for any royalty."[10]

Qualcomm pioneered cellular technology and contributed to each subsequent generation. Qualcomm now holds over 100,000 cellular-related patents and derives much of its revenue from licensing its patents, which include standard essential patents subject to FRAND commitments. Qualcomm also is a highly successful supplier of "modem chips," which cellular phones and similar devices use to transmit and receive data. Qualcomm pledged not to assert its patents against rival suppliers of modem chips, but did not grant them licenses. Qualcomm instead licensed makers of cellular devices, enforcing a "no license, no chips" policy, under which it sold its modem chips only to licensed makers of cellular devices.

Qualcomm's licensing policies responded to a feature of patent law and to a quirk. The feature is the exhaustion doctrine, which "limits a patentee's right to control what others can do with an article embodying or containing an invention."[11] If modem chips practiced all of Qualcomm's cellular technology patents, the exhaustion doctrine potentially could mean that cellular device makers would not require licenses from Qualcomm. But Qualcomm contended that many of its patents were practiced by cellular devices and not by modem chips,[12] and Judge Koh made no contrary finding. One must presume, therefore, that cellular device makers needed Qualcomm licenses even if chip suppliers had exhaustive licenses.

The quirk is the way courts approach reasonable royalties under FRAND commitments. Royalties usually are computed by

---

2 Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations (2020).

3 On congressional action leading to the Sherman Act, see Gregory J. Werden, The Foundations of Antitrust: Events, Ideas, and Doctrines 20–38 (2020).

4 See *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015).

5 See Brief of 46 Amici Curiae Law and Economics Scholars in Support of Petition for Rehearing en Banc, *FTC v. Qualcomm Inc.* (No. 19-16122).

6 I take no position on Qualcomm's conduct apart from the challenged licensing practices.

7 Order Granting FTC's Motion for Partial Summary Judgment, *FTC v. Qualcomm, Inc.* (No. 17-CV-00220 Nov. 6, 2018). In reversing on the antitrust merits, the Ninth Circuit held that the breach of contract issue was moot. *FTC v. Qualcomm Inc.* (No. 19-16122 Aug. 11, 2020) 19 n.12, 20 & n.13 (hereinafter Slip Op.).

8 *FTC v. Qualcomm Inc.,* 411 F. Supp. 3d 658, 773 (N.D. Cal. 2019).

9 *Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 24 (1964).

10 *United States v. General Electric Co.*, 272 U.S. 476, 489 (1926).

11 *Bowman v. Monsanto Co.*, 569 U.S. 278, 283 (2013).

12 Opening Brief for Appellant Qualcomm Incorporated, *FTC v. Qualcomm Inc.* (No. 19-16122) 2, 11–13.

multiplying a royalty rate by a royalty base, and the base usually is licensee sales revenue for articles practicing the licensed invention. In determining whether a royalty is reasonable, courts tend to focus on the percentage rate. Consequently, a licensin g deal that paid Qualcomm $10 per cellphone could be deemed to have a reasonable royalty if the base were the sales revenue for cellular devices, but an unreasonable royalty if the base were the sales revenue for modem chips. A payment of $10 per device works out to a low percentage rate in the former case but a very high percentage rate in the latter.

Before trial, Judge Koh granted an FTC motion seeking a declaration that Qualcomm's FRAND commitments required it to license rival suppliers of modem chips. Her liability opinion reaffirmed that determination and further held that Qualcomm's failure to license rival chip suppliers violated an antitrust duty to deal under the standards of *Aspen Skiing*.[13] The Ninth Circuit reversed Judge Koh's duty-to-deal holding because her application of *Aspen Skiing* was seriously flawed and the FTC declined to defend it.[14]

On appeal the FTC took the position that Qualcomm had no antitrust duty to license rival modem chip suppliers, but Qualcomm nevertheless violated antitrust law by refusing to license them. The FTC argued that the refusal breached a FRAND commitment and that such a breach violates Section 2 of the Sherman Act when it has "the effect of substantially contributing to the acquisition or maintenance of monopoly power in the relevant market."[15] The Ninth Circuit was dismissive of the argument[16] and was persuaded by commentators who "expressed caution about using the antitrust laws to remedy what are essentially contractual disputes between private parties engaged in the pursuit of technological innovation."[17]

The main focus of the case and of Judge Koh's opinion was Qualcomm's "no license, no chips" policy. The FTC alleged that Qualcomm possessed monopoly power in modem chips and that the "no license, no chips" policy materially contributed to the maintenance of Qualcomm's modem chip monopoly. The FTC's theory had two parts: First, the "no license, no chips" policy allowed Qualcomm to obtain higher royalties from makers of cellular devices. Second, the higher royalty payments undermined competition among modem chip suppliers.

Unsurprisingly, Judge Koh found that Qualcomm's licensing policies that were "more lucrative" than alternative policies,[18] and she cited ample evidence that the "no license, no chips" policy affected Qualcomm's license negotiations with makers of cellular devices.[19] In particular, she found that the "no license, no chips" policy kept cellular device makers from seeking a judicial determination of a reasonable royalty.[20] As noted above, Judge Koh found that Qualcomm collected an "unreasonably high royalty" on its patent portfolio, and she followed the FTC's lead in labeling the "abnormal" part of the royalty a "surcharge," which she evidently believed to be substantial. As the FTC phrased Judge Koh's conclusion, "the surcharge reflected Qualcomm's chip monopoly, not the value of its patents."[21]

Judge Koh held that Qualcomm "raised its rivals' costs" by imposing the "surcharge,"[22] but that holding was not sound economics.[23] As Judge Koh indicated, a "surcharge" would increase the amount consumers pay for cellular devices and decrease the quantity sold.[24] But any "surcharge" was paid by cellular device makers, so it neither directly nor indirectly raised chip-suppliers' costs. In contrast, Qualcomm would have raised its rivals' costs had it done as Judge Koh found that it should have done by licensing rival chip-suppliers at the FRAND rate.[25]

Judge Koh opined that "Qualcomm's unreasonably high royalty rates enable[d] Qualcomm to control rivals' prices because Qualcomm receives the royalty even when [a maker of cellular

13 *Qualcomm*, 411 F. Supp. 3d at 758–62, citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1985).

14 Slip Op. 31–36.

15 Brief of the Federal Trade Commission, *FTC v. Qualcomm Inc.* (No. 19-16122) 69 (hereinafter FTC Br.).

16 Slip Op. 36–40.

17 Slip Op. 39.

18 *Qualcomm,* 411 F. Supp. 3d at 751–56.

19 *Id.* at 697–744.

20 *Id.* at 786–90.

21 FTC Br. 45.

22 *Qualcomm*, 411 F. Supp. 3d at 791.

23 Amici supporting rehearing insist that the "case is about raising rivals' costs." Brief, *supra* note 5, at 15 n.7.

24 *Qualcomm*, 411 F. Supp. 3d at 792.

25 *Id.* at 744–63.

devices] uses one of Qualcomm's rival's chips."[26] In defense of this conclusion, the FTC asserted that the "surcharge" effected "the same mechanism of anticompetitive harm" as Microsoft's per-processor license in *Caldera*.[27] The *Caldera* license required a PC maker to pay the full MS DOS license fee on each PC it produced. Installing a rival operating system, therefore, meant paying the full price for two operating systems.

Qualcomm's "surcharge" could not have "the same" effect as the *Caldera* license because paying the "surcharge" on a cellular device did not entitle the device maker to get a Qualcomm modem chip at no extra charge. For each cellular device produced, the maker had to pay either the nominal price of Qualcomm's chip or the price of a rival's chip, and Judge Koh found that Qualcomm's nominal prices were "monopoly prices" that generated substantial operating margins.[28] Therefore, the "surcharge" in the *Qualcomm* case could not distort choice in "the same" way as the per-processor license in the *Caldera* case.

The FTC argued as a general matter that Qualcomm "harmed competition by imposing a surcharge on rivals' chips," and the FTC evidently contended that any "surcharge" was "anticompetitive."[29] Apart from analogizing to the *Caldera* case, however, the FTC did not indicate how the "surcharge" harmed competition. The Ninth Circuit cannot be faulted for holding that: "[I]n order to make out a § 2 violation, the anticompetitive harm identified must be to *competition itself,* not merely to competitors. . . . The FTC identifie[d] no such harm to *competition*."[30] The court added that the FTC had no "cogent theory of anticompetitive harm" but rather "conflate[d] antitrust liability and patent law liability."[31]

An amicus brief supporting the FTC on appeal purported to explain through an example how the "surcharge" harmed competition.[32] The example posited a $20 "all-in" monopoly price for modem chips, which Qualcomm collected by charging a $10 nominal price for its chip plus a $10 license fee composed of a $2 FRAND royalty and an $8 "surcharge." The example further posited that Qualcomm's modem chip rivals had marginal production costs of $11, so Qualcomm could earn the full monopoly profit from the sale of modem chips while nominally pricing its chips below its rivals' costs.

With no contrary finding from Judge Koh, one must attribute much of Qualcomm's royalty to patents not practiced by modem chips, so let half of the $10 fee be for patents practiced by modem chips. With that modification, the example can be squared with Judge Koh's findings on Qualcomm's nominal prices and margins. The nominal monopoly price is now $15 — the $20 "all-in" monopoly price less the $5 royalty for patents practiced by modem chips. As modified, the example does not illustrate Qualcomm excluding higher-cost modem chip rivals; rather, it illustrates Qualcomm holding a monopoly pricing umbrella over them, with the "surcharge" controlling its height. If, contrary to Judge Koh's findings, Qualcomm faced intense competition from rival modem chip suppliers, the nominal competitive price would be the rivals' $11 marginal cost, and the "surcharge" would not affect nominal prices.

The FTC's economic expert, Carl Shapiro, had testified at trial that the "surcharge" harmed competition, but he only explained how it harmed competitors, and neither Judge Koh's opinion nor the FTC's appeal brief recounted his analysis. Professor Shapiro presented a simple example of bargaining between a single cellular device maker and one of Qualcomm's rival modem chip suppliers. In a bilateral bargaining problem, the Nash solution, assumed by Shapiro, equally divides the joint gain from reaching agreement.

Bargaining models can be very useful in understanding patent licensing scenarios. Indeed, a bargaining model could be used to determine how much of the profits from the sale of cellular devices should go to the owners of the patents they practice. A considerable challenge is presented in properly calibrating the model because there are so many inventions and implementors, and different solution concepts could yield different predictions. But a bargaining model plausibly would indicate that inventors are under-compensated.

Using purely illustrative numerical values, Professor Shapiro posited that a cellular device maker derived $40 in value from incorporating a modem chip. He also posited that the marginal cost of producing a modem chip was $5 and that both the FRAND royalty and the "surcharge" were $10. The Nash bargaining solution predicted that the chip price would equally divide the remaining $15 gain from trade, resulting in the rival

26 *Id.* at 791.

27 FTC Br. 36–44, citing *Caldera, Inc v. Microsoft Corp.*, 87 F. Supp. 2d 1244 (D. Utah 1999).

28 *Qualcomm*, 411 F. Supp. 3d at 692, 696, 772, 800.

29 FTC Br. 34 (capitalization altered), 41.

30 Slip Op. 37.

31 Slip Op. 41.

32 Brief of Curiae Law and Economics Scholars in Support of Appellee and *Affirmance, FTC v. Qualcomm Inc.* (No. 19-16122) 7–9.

modem chip supplier earning a margin of $7.50. Absent the "surcharge," bargaining would equally divide $25, resulting in a margin of $12.50 for the rival modem chip supplier.

Judge Koh might have declined to adopt Professor Shapiro's analysis for doctrinal reasons: The Supreme Court's *linkLine* decision had rendered a margin-squeeze theory untenable.[33] Alternatively, Judge Koh might have declined to adopt Shapiro's analysis for substantive reasons: She might have thought that Shapiro provided no convincing reason to conclude that the "surcharge" harmed competition, rather than just competitors, because a "surcharge" as large as $10 only reduced the rival's margin to a still-very-healthy 150 percent.

On appeal, the FTC argued that it had not advanced a margin squeeze theory because it had not focused on the adequacy of the rivals' margins.[34] And the FTC contended that Judge Koh correctly relied on the "uncontroversial proposition" that Section 2 of the Sherman Act prohibits the "use of [a] monopoly to impose a financial penalty on . . . customers' use of rivals' products."[35] But the Ninth Circuit declined "to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its [patent] portfolios corresponds to the prices the market appears willing to pay for those [patents] in the form of licensing royalty rates."[36]

In attacking Qualcomm's licensing practices, the FTC asserted four highly controversial propositions: (1) that a patent holder can violate Section 2 of the Sherman Act simply by refusing to sell its goods to anyone infringing its patents; (2) that Section 2 provides a club the government should use to beat down the royalties on standard essential patents; (3) that lowering a monopoly pricing umbrella can be the anticompetitive conduct supporting the monopoly maintenance offense; and implicitly, (4) that all of the developers of cellular technologies should divide just a few dollars on every cellphone sold.

On September 25, the FTC petitioned for rehearing *en banc*, but the petition does not demonstrate the unlawfulness of Qualcomm's patent licensing practices under established doctrine. Nor does it explain how the "surcharge" harmed competition. At the highest level, the petition argues that something must be amiss because the panel "acknowledged that a monopolist acts anticompetitively if it requires customers to pay a tax when they buy from its rivals," yet the panel also held that the FTC had no "cogent theory of anticompetitive harm."[37] But there was no inconsistency. The panel correctly held that the district court's findings on Qualcomm's licensing differed materially from the facts of the *Caldera* case on which the FTC relied,[38] and while the facts in *Caldera* established harm to competition, Judge Koh's findings established only harm to competitors.

On rehearing, the FTC relies on the first case filed by the Department of Justice under the Clayton Act.[39] The petition does not mention that the trial court emphasized the different standards of Section 3 of the Clayton Act and Section 2 of the Sherman Act.[40] Nor does the petition mention that the court did not enjoin the fee that the FTC analogizes to Qualcomm's "surcharge," but rather modified the clause containing the fee by striking a rebate proviso.[41] The petition asserts that, in affirming, the Supreme Court "condemned the fee as exclusionary,"[42] but the Court did not separately condemn the fee; rather, it opined that all seven "clauses enjoined" collectively effected "tying."[43] Moreover, the Supreme Court also stressed the difference in standards between the Clayton and Sherman Acts.[44]

The petition contends that the panel "flout[ed] the Supreme Court's instruction that courts must apply the antitrust laws based on economic substance, not formal labels,"[45] but the FTC defended Judge Koh's judgment with labels rather than economic substance. Rather than rely economic analysis of the "surcharge," the FTC relied easily distinguishable precedent. The petition contends that the panel "contradicts" the Supreme

33 See *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

34 FTC Br. 67.

35 *Id.*

36 Slip Op. 44.

37 Petition of the Federal Trade Commission for Rehearing *en banc, FTC v. Qualcomm Inc.* (No. 19-16122) 2 (hereinafter Petition)

38 Slip Op. 45–47.

39 Petition 13–14, citing *United States v. United Shoe Mach. Co.*, 234 F. 127, 134 (E.D. Mo. 1916).

40 *United States v. United Shoe Mach. Co.*, 264 F. 138, 161–63 (E.D. Mo. 1920).

41 *Id.* at 168.

42 Petition 14, citing *United States v. United Shoe Mach. Co.*, 258 U.S. 451, 456–58 (1922).

43 *United Shoe Mach. Co.,* 258 U.S. at 457–58.

44 *Id.* at 458–62.

45 Petition 2.

Court's "holdings that patent-related agreements are not exempt from antitrust scrutiny,"[46] but the panel did scrutinize Qualcomm's conduct, and the panel contradicted no Supreme Court holding in demanding a clear demonstration of harm to competition. Judge Koh found that Qualcomm's licensing practices harmed its modem chip rivals, but the Supreme Court has not held that a monopolist violates Section 2 whenever it harms rivals.

More specifically, the petition contends that the panel committed three errors of law. First, the petition contends that the panel gave Qualcomm's "surcharge" a free pass because it was styled as a royalty, but that is not a fair reading of the opinion, which held the FTC had "not met its burden" because "clearer proof of anticompetitive effect" was required "in these dynamic and rapidly changing technology markets."[47] And the panel was right to say that whether the all-in price of modem chips was "reasonable or unreasonable is an issue that sounds in patent law, not antitrust law."[48] Even if Qualcomm's royalties were "unreasonable," the FTC did not establish that they harmed competition, as the panel held.

Second, the petition contends that the panel mistakenly held that the "surcharge" could not be anticompetitive because makers of cellular devices had to pay it no matter which modem chip they used. But the panel only held the FTC had not adequately explained why the "surcharge" should be deemed unlawful exclusionary conduct. At bottom, the FTC faults the panel for failing to see clear merit in an argument that the FTC intentionally kept vague. The petition suggests that the "surcharge" allowed Qualcomm "to insulate itself from" price competition,[49] but the panel did not err in concluding that the FTC failed to prove that.

Third, the petition attributes error to the panel's criticism of the district court's focus on harm to cellular devices makers, but the panel was right to observe that the district court focused too much on what cellular device makers paid Qualcomm and too little on how paying Qualcomm so much harmed competition in modem chips. Harm to cellular device makers was of no moment in the case unless causally related to harm to competition in modem chips. The petition reads too much into the panel's observation that the "surcharge" "had no direct impact on competition" in the relevant markets. The parentheticals in the panel's citations supporting the observation show that its point was that consumer injury does not trigger antitrust liability without harm to competition.

The rehearing petition knocks down straw men built out of short phrases in the panel opinion, but shortcomings in neither the FTC's case nor Judge Koh's analysis can be excused by flaws in the panel's prose. The panel did not rest its decision on the legal propositions the petition attributes to it, but rather demanded "clearer proof of anticompetitive effect." Even if Judge Koh was right to find that Qualcomm's conduct was actionable under contract and patent law, the FTC did not show that the effect of the conduct was to maintain a monopoly in modem chips. Antitrust law exists to protect the competitive process from private efforts to sabotage it, and the Ninth Circuit's *Qualcomm* opinion kept antitrust in its lane.

An encouraging aspect of the report by the majority staff of the House Subcommittee on Antitrust, Commercial and Administrative Law is its focus on competition. The report, however, recommends legislation "clarifying that [the antitrust laws] are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[50] It would be useful to clarify that antitrust in the United States is premised on the belief that protecting competition promotes other social goals, but the report appears to favor complicating antitrust investigations and trials, and inadvertently to provide a statutory basis for *defenses* that courts now hold inadmissible.

The Subcommittee should learn from the experience of Donald F. Turner when he took charge of the Antitrust Division of the Justice Department in 1965. On August 10, seven weeks in to his 1077-day tenure, he recounted arguments that he had heard in support of proposed mergers:

> I have had proponents defend a contemplated merger on the grounds that it would promote the national defense, assist in solving the balance of payments problem, reduce unemployment and contribute to the Administration's anti-poverty program. I fully expect to hear before long that a merger should be allowed because it will contribute to the President's program for making America beautiful.[51]

---

46 *Id.*

47 Slip Op. 51, 56.

48 Slip Op. 49.

49 Petition 15.

50 Report, *supra* note 2, at 391.

51 Donald F. Turner, *Antitrust Enforcement Policy,* 29 A.B.A. Antitrust Section 187, 191 (1965).

Turner went on to champion a highly restrictive merger policy and was deeply involved in the Supreme Court litigation of merger cases marking the high watermark of interventionist antitrust. But he observed at the outset that he did not think it "possible to bring very much order into antitrust law unless we can succeed in disentangling it from many policy considerations having little or nothing to do with the protection of competition."[52]

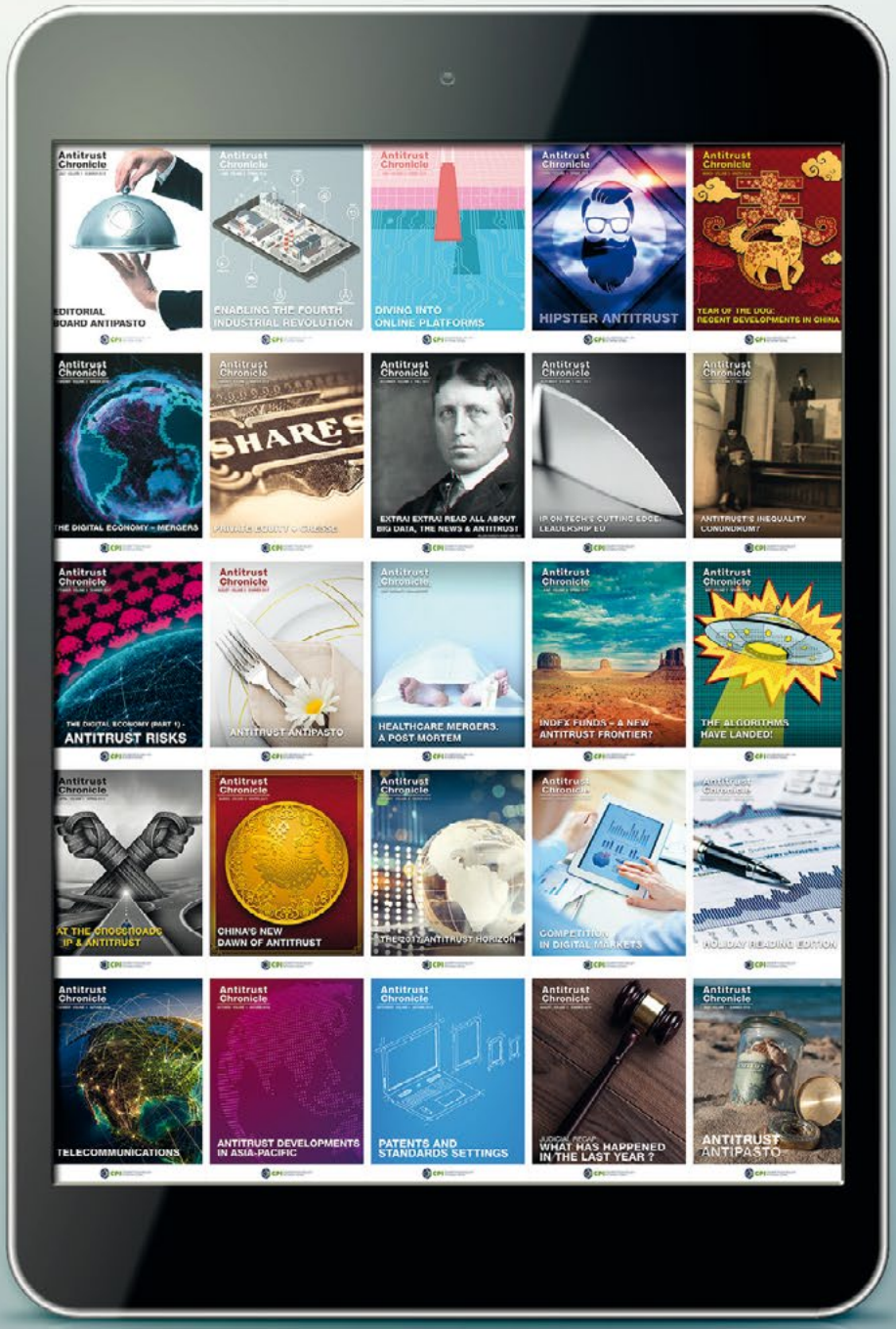
52 *Id.*

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.




CPI
COMPETITION POLI CY
INTERNA TIONA L