THE INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: LOOKING IN THE WRONG FOREST?

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U.S. antitrust law has gone through a long evolutionary process of refinement in light of changing business practices and improving understandings of how the economy functions and how it responds to the law-enforcement systems applied to competitive conduct. The Sherman Act contains two very brief and general prohibitions – on "restraint of trade" and "monopolization" – which require interpretation by courts faced with particular forms of business conduct challenged in specific cases. The earliest cases – *United States v. Trans-Missouri Freight Ass'n*., 166 U.S. 290 (1897); *United States v. Joint Traffic Ass'n.*, 171 U.S. 505 (1898) – seemed to require automatic condemnation of any restrictive conduct, without regard to reasonableness, business justification or other facts and circumstances.

Both cases, however, clearly involved what we now recognize as classic cartels – behavior lacking any potential for material competitive benefit. By 1914, when the Clayton Act and FTC Act became law, the Supreme Court had clarified that while such cartel conduct is subject to a *per se* rule, the default mode of antitrust analysis is the rule of reason. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Company*, 221 U.S. 106 (1911). The rule of reason allows consideration of particular facts and circumstances that may refute contentions that challenged conduct is anticompetitive. During this early period of antitrust interpretation, the only other practice tossed into the *per se* bin was resale price maintenance. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Thus matters stood until a powerful strain of aggressive enforcement appeared in the waning years of the New Deal. Initially, FDR had chosen to encourage cartelization of U.S. industry through the National Industrial Recovery Act of 1933, which suspended antitrust law and encouraged or compelled industries to adopt and observe "codes of fair competition." Although FDR continued to press this solution despite predictable effects on prices (higher) and output (lower) across the economy, this approach was thwarted when a unanimous Supreme Court declared the key provisions of the legislation unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Searching for a course correction, FDR was persuaded by a gaggle of advisers led by Robert Jackson (appointed in quick succession by FDR as head of the Antitrust Division in 1937, then Solicitor General in 1938, then Attorney General in 1940, and finally Associate Justice of the Supreme Court in 1941) to support competition and stronger antitrust enforcement. With support from Jackson's successor at the Antitrust Division, Thurman Arnold, as well as Theodore Roosevelt-era Progressive judges Learned Hand, Justices Louis Brandeis, and William O. Douglas, numerous additional practices were condemned to *per se* treatment under antitrust law.

This meant that such practices as horizontal and vertical agreements, as well as intellectual property licensing terms, could not be defended by reference to exonerating facts and circumstances arising in specific cases (e.g. procompetitive justification, lack of anticompetitive effect, or absence of market power). Although never technically deemed *per se* illegal, mergers and similar transactions became subject to the rule described by Justice Potter Stewart as "the government always wins" under Section 7 of the Clayton Act, based on rigid structural presumptions established in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and applied even to competitively inconsequential transactions in cases such as *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). Similarly, while the *per se* rule was not specifically applied to Section 2 of the Sherman Act, monopolists were presumed liable for monopolization unless they could prove that their market position had been "thrust upon" them – even though their conduct had been "honestly industrial." In cases such as *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (authored by Learned Hand), and *United Shoe Machinery Corp. v. U.S.*, 347 U.S. 521 (1954)(liability finding affirmed *per curiam* on direct appeal); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968)(dissolution ordered), liability was found and dissolution of the defendant was ordered – in Alcoa's case, as punishment for expanding capacity to meet demand. This *per se*/structuralist craze culminated in 1972 in *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), in which the Supreme Court reaffirmed the *per se* rule and openly mocked the idea of applying economic analysis in defense of non-price restraints employed by a procompetitive joint venture.[2]

The near-universal application of *per se* rules and powerful presumptions of illegality based on formalistic categories and simplistic structural triggers, as well as the overt rejection of economics, had important real-world consequences. They elicited a broad critical attack from scholars of antitrust law and the developing field of antitrust economics, but more importantly they contributed directly – in concert with a variety of other legal and economic policies characteristic of the 1960's and 1970's – to a crushing economic downturn in the U.S. "Stagflation" – low growth with high inflation and unemployment – plagued the U.S. economy of the 1970's. Key U.S. industries including automobiles and consumer electronic products lost substantial ground to rising Asian and European competitors.

2 "Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." *Topco Assocs*., *supra*, 405 U.S. at 609-10 n.10.

President Nixon delivered three economic "shocks" in 1971 – ending convertibility of the U.S. dollar into gold, imposing economy-wide wage and price controls (which were not fully rescinded until the Reagan Administration), and mandating a 10 percent surcharge on all imports. These and other policy actions exacerbated the adverse economic trends, and by the time of the Carter-Reagan transition U.S. rates of unemployment, inflation and interest were all running well into double digits.

Fortunately, the federal government responded with broad reconsideration of and substantial changes to a wide variety of economic and regulatory policies, including antitrust enforcement and sectoral economic regulation. The Supreme Court first began to relent on its *per se*/structuralist approach in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Perhaps most critically, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) reversed *Topco's* overt rejection of economic analysis. Thereafter the Supreme Court consistently construed antitrust law to protect competition rather than competitors, and to fashion rules most likely to result in maximum benefit to the U.S. economy. Ultimately almost all practices outside the classic cartel category were returned to rule of reason treatment. By 2007, even the *per se* prohibition on resale price agreements was overruled based on new economic understandings of vertical relationships. Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007). Reduction and elimination of crippling bureaucratic controls on competition in major U.S. industries – air and surface transportation, energy, for example – began to gain broad support around the time of the Ford-Carter transition. Eventually the Interstate Commerce Commission and the Civil Aeronautics Board were abolished, while economic regulation by other agencies including the Federal Communications Commission and the Federal Energy Regulatory Commission were more closely limited to industry sectors characterized by serious market failure.

Although U.S. antitrust virtually abandoned the *per se* rule (except for classic cartels) and the rigid structural presumptions against mergers and monopolists, determined enforcement efforts continued apace. Monopolization litigation filed in 1974 resulted in dissolution of the former Bell System, then the world's largest private business enterprise, pursuant to a 1982 consent decree. Using the comprehensive tools of merger enforcement – including the Hart-Scott-Rodino provisions requiring prenotification and waiting for significant transactions – thousands of structural transactions were reviewed annually, deterring anticompetitive combinations and forcing the modification or abandonment of many in light of agency objections or (in litigated cases) court decisions. Two separate monopolization cases against Microsoft Corp. resulted in consent decrees imposing significant limitations on the firm's competitive conduct in the provision of software. Throughout this period, U.S. antitrust enforcement benefitted from a broad consensus – among agency enforcement officials, antitrust practitioners, scholars of antitrust law and economics, the business community, and (most consequentially) the courts – in support of the economics-based and competition-focused approach to antitrust interpretation.

The soundness of this consensus approach is reflected in the unprecedented record of U.S. economic progress in the period following the demise of the *per se*/structuralist approach. With radical and continuing improvements in numerous technologies – data capture, storage, analysis and transmission, packet switching, the internet, cellular and wireless communication, AI, bioscience, smartphones, to name just a few – U.S. economic output soared (from an annual rate of $3.1 trillion in the first quarter of 1981 to $21.7 trillion in the final quarter of 2019) and the U.S. was confirmed as the global leader in innovation. Firms based on the new technologies, begun by single individuals or small circles of young entrepreneurs, have emerged as the largest and most valuable enterprises in history, all in a relatively brief period of time. Amazon was founded in 1994 as an online bookstore; Google was founded in 1998 to provide an internet search engine; Facebook was founded in 2004 to provide a college directory. Microsoft, launched by two childhood friends in 1975, got an early foothold in personal computer software and grew exponentially with the meteoric rise of the PC sector. Apple dates to 1976 when it debuted its own PC, but it teetered on the brink of failure as recently as 1997. After rehiring one of its exiled founders, Steve Jobs, and through a series of innovative products and services (iMac, iPhone, iPad and iTunes, among others), it now stands as the single most valuable private business enterprise in history ($2 trillion at this writing), with Microsoft not far behind.

Of course, the shift in U.S. antitrust policy that began in 1974 cannot claim all credit for enabling this unprecedented economic performance. Other important changes in policy – substantial strengthening of intellectual property protection, promotion of an open international trade regime, as well as shifts in regulation and fiscal, tax, and monetary policies – also had important roles. But antitrust enforcement has been the broadest prevailing form of direct U.S. government control of private business conduct throughout this period (especially given the elimination and reduction of sectoral bureaucratic economic controls, as previously mentioned) so its role cannot be minimized either.

Paradoxically, however, the prevailing antitrust consensus of the last half-century is now the subject of a variety of fundamental attacks. One early source of these attacks was the Obama-Biden Administration. In the Administration's waning months, the Council of Economic Advisers (an agency within the Executive Office of the President, charged with issuing the annual Economic Report of the President) issued a special report itemizing important questions regarding the state of competition in the U.S.[3] The Report suggested that concentration was increasing and competition was declining in a broad variety of U.S. industries, and implied that increased antitrust enforcement would be an appropriate antidote. Although carefully hedged and largely devoid of "sound bites" containing drastic conclusions or proposing extreme solutions, the Report sparked a flow of wider criticism of U.S. economic performance and antitrust policy that quickly turned into a flood. In early 2017 an article appeared in the Yale Law Journal suggesting that the undeniable success of U.S. technology firms (Amazon was the direct target of the article) was attributable not to enthusiastic market acceptance of innovative services but to a variety of anticompetitive practices.[4] The article claimed boldly that such practices had been allowed to flourish by antitrust policy that "views low consumer prices, alone, to be evidence of sound competition" and focuses on short-run price and output effects, while ignoring other dimensions of competition such as product quality and innovation.

Despite glaring questions regarding the methodology of the Obama CEA Report[5] and the seriously distorted portrayal of antitrust enforcement in the Yale Law Journal article,[6] similar expressions of lament about U.S. competition and the state of antitrust policy are now so widespread that they are trivially easy to locate in the output of media commentators and various think tanks such as the American Antitrust Institute, the Open Markets Institute, the Roosevelt Institute, and the Washington Center for Equitable Growth. Reflecting the continuing proliferation of these views, on June 3, 2019 the House Judiciary Committee ("HJC") launched an "Investigation of Competition in Digital Markets." Following a lengthy series of hearings and based on a variety of other inputs – including testimony from leaders of four of the largest technology companies (Google's parent Alphabet, Amazon, Apple, and Facebook) and a variety of documents and other data collected from those companies and from third parties – on October 6, 2020 the Committee concluded the investigation by releasing a Majority Staff Report and Recommendations ("MSRR"). Whatever its merits – which are subject to sharp debate – the 449-page MSRR (just outdoing the 448-page "Mueller Report" on Russian Interference in the 2016 Election) may provide a point of reference in the long-running drama involving what (if anything) to do about the growing list of complaints about the leading firms of the digital economy.

As the disruptive impact of the leading technology firms widens, the list of grievances against them has grown in parallel. For example, the internet has profoundly impacted traditional media such as newspapers, magazines, radio and television broadcasting, and film. As the digital companies' roles as suppliers of news and entertainment have increased, older media have suffered significant declines in advertising and other revenue, leading to retrenchment and many closures. It is no surprise that the first hearing held during the HJC investigation focused on demands by various traditional media organizations for an antitrust exemption. The proposed legislation, H.R. 2054, the Journalism Competition and Preservation Act, would allow collective bargaining with online platforms for display of media content – a clear evocation of the NIRA "code" approach that was the center-piece of FDR's broad cartelization policy in the first days of the New Deal.

A similar pattern is observable with regard to firms offering other products or services of interest to or connected with the digital platforms. The HJC investigators conducted a field hearing to receive testimony from companies like Tile (offering a Bluetooth-based object-location package including app and hardware), Sonos (home audio/wireless speakers) and Basecamp (software including management and premium email), each having a story to tell about alleged rough handling by the platforms. Each of these firms relies on one or more of the digital platforms as an important path to market. Testimony included allegations of arbitrary or unpredictable shifts in critical service terms, misuse of competitively sensitive data (allowing the platform to launch a competitive offering, for example), and other forms of harmful conduct.

The MSRR contains a long list of proposed solutions to what it asserts to be the dominant and illicitly obtained power of the leading technology companies. In addition to structural separation and the imposition of line-of-business restrictions, the recommendations for change in antitrust law would essentially undo all the post-*Topco* refinements wrought by the enforcement agencies, scholars of antitrust law and economics, and other policy experts who have contributed to the long series of

3 Council of Economic Advisers, Benefits of Competition and Indicators of Market Power (April 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

4 Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. 710 (2017).

5 Gregory J. Werden & Luke M. Froeb, Don't Panic: A Guide to Claims of Increasing Concentration (April 5, 2018). Antitrust Magazine, Forthcoming, Vanderbilt Owen Graduate School of Management Research Paper No. 3156912, available at https://ssrn.com/abstract=3156912 or http://dx.doi.org/10.2139/ssrn.3156912.

6 See, e.g. Jonathan B. Baker, Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation, 74 Antitrust L.J. 575 (2007) ("On the whole . . . antitrust rules and enforcement today are appropriately focused to promote innovation.")

agency policy initiatives and court cases of the last half-century. Everything from the concept of antitrust standing and standards for dismissal, for summary judgment, for the elements of predatory pricing, monopolization and conspiracy claims in federal antitrust proceedings would go in the dumpster. There are at least three fundamental reasons for skepticism regarding any implementation of the MSRR recommendations.

First, in assessing the main issues concerning the market positions of the technology companies and the means by which those positions were achieved and maintained, Congressional hearings are no substitute for the investigative and adjudicative processes of the federal judiciary. The rights of a witness before a Congressional committee are nothing like those available to a target subject to compulsory process issued by an agency, or to a defendant in a federal court antitrust case. Had the technology companies been able to avail themselves of the conventional array of legal rights – confrontation and cross-examination of adverse witnesses, presentation of witnesses in support of their positions, compulsory process to obtain exculpatory evidence, open proceedings before and decision-making by a specific Article III judge, to name just a few – the conclusions might have been appreciably or even radically different than those reached in the MSRR. Awareness of these differences in the quality of the truth-finding opportunities offered by Congressional hearings as distinct from judicial proceedings should be especially acute in light of the fact that the MSRR reflects only the views of the majority staff, as distinct (for example) from a bipartisan effort. The minority staff has also issued two distinct reports based on the hearings, reaching significantly (but not completely) different views on many of the issues taken up by the MSRR – particularly in regards to proposed solutions. But the liveliest reading (by far) arising from the HJC Investigation is the letter of October 6, 2020 from HJC Ranking Member Jordan to Chairman Nadler, pulling no punches in explaining that the hearing was not intended to be balanced but to reach predetermined conclusions in support of a particular agenda, and to avoid issues viewed as critical by the Republican HJC membership.[7]

Correlatively, it should also be pointed out that the MSRR's proposals for comprehensive obliteration of the last half-century of agency, scholarly, and judicial output in the antitrust field are not accompanied by any proposed draft legislation. Each item on the extensive list of changes would have to be embodied in specific language – a process that one can easily imagine stretching out many years, given the comprehensive breadth and radical character of what is being proposed. During that process, if it is ever undertaken, there should be at least some additional opportunity for those who doubt or oppose the types of solutions itemized in the MSRR to marshal evidence and policy analysis sufficient to create public and Congressional hesitation or resistance to such changes. There may be some exceptions to this generalization – the proposal for additional appropriations by Congress for the federal antirust agencies – but they are limited.

Second, the MSRR perspective on antitrust and the technology industry appears to fail an obvious reality check – a failure that would likely become apparent upon further consideration of any legislative proposals that might arise from the MSRR. It is often difficult to assess important antitrust issues objectively because opportunities to conduct controlled experiments are rare. When faced with a question whether, for example, a particular merger will lessen competition substantially, significant projection and speculation is necessary because the counterfactual cannot be observed directly: in other words, we can't observe two worlds – one in which the merger occurs, and one in which it is prohibited, and then assess which alternative produced the most favorable outcome from the perspective of antitrust policy. We have to argue from other sources of understanding (theory, data, prior similar experience if any) about the best outcome, considering error costs and other elements of decision science. But in the case of the technology sector, we are fortunate to have something like a controlled experiment: the antitrust policies of the European Communities (1962-1993) and their successor, the European Union.

EU competition rules had their origin in the 1957 Treaty of Rome that created the European Economic Community. The specifics were worked out initially and put into practice in 1962. Although the two fundamental substantive provisions of EEC antitrust were broadly similar to the two main provisions of the Sherman Act, there were (and remain) at least four very important differences: First, the provision on restrictive agreements adopted a highly precautionary approach, in which most any agreed restrictions (with potential effect on intra-EEC trade) were presumptively illegal, void *ab initio* and subject to fines unless notified to and exempted by the European antitrust agency, now known as the Directorate General for Competition ("DG Comp"). Second, the provision analogous to our monopolization provision, "abuse of dominance," envisioned a more direct regulatory jurisdiction over firms with market power by the European Commission. Under Section 2 of the Sherman Act a monopolist may charge what the market will bear, absent any unlawful exclusionary conduct. By contrast, a dominant firm may be compelled to pay substantial fines for the infringement of charging "unfair" prices – whether unfairly high, low, or different/discriminatory. (Analogous principles apply to other terms of trade.) Third,

7 https://republicans-judiciary.house.gov/wp-content/uploads/2020/10/2020-10-06-JDJ-to-Nadler-re-Tech-Investigation.pdf.

the ultimate decision-making process employed by the EU is a political process. While case decisions under U.S. antitrust law are left to the federal judiciary and ultimately to the Supreme Court, all EU competition decisions are the responsibility of the full College of Commissioners, politicians (one from each Member State) appointed in a complex process engineered by consensus among the 27 EU Member States and subject to the approval of the European Parliament. Although the Commission's competition decisions are subject to the review of the European courts, the Commission enjoys a substantial margin of discretion in its decisions (other than on pure points of law). Finally, at all but the key initial and final stages of decision, DG Comp is responsible for all aspects of its competition proceedings – investigation, presentation and assessment of evidence, the content of the decision, and formulation of any remedy. Although the parties have certain procedural rights, the College of Commissioners is not an appellate court or a neutral decision-making body, and none of the procedural protections available within the U.S. judicial system (prohibition on *ex parte* contact, for example) are available to the party whose conduct is challenged as an infringement. In fact, recipients of EC complaints are at no time entitled to an adversarial hearing before a neutral decision maker prior to the stage of judicial review following the Commission's decision.

The net effect of all of these key differences is to create a competition-law environment in the EU where limits on competitive conduct (and especially the conduct of dominant firms) are considerably more restrictive than has been the case under U.S. antitrust law. In recent decades, the Commission has not been reticent to use the full extent of its powers and discretion to challenge the conduct of high-technology firms based in the U.S. The EC has imposed billions of Euros in fines on Intel, Google, Microsoft, Qualcomm, and Apple (in Apple's case technically a State-aid ruling, as distinct from a competition-law ruling). The HJC hearing received statements from the EU Vice President and Commissioner for Competition, Margrethe Vestager, and the MSRR advocates a variety of antitrust approaches similar to those adopted by the European Commission, such as an "abuse of dominance" standard rather than the more competition-focused "monopolization" rules observed in the U.S.

The point here, however, is that the differences in U.S. and EU competition enforcement (including treatment of large technology companies) provide a natural experiment regarding the merits of the two distinct approaches to antitrust policy. Given the differences, what does the outcome say about the two approaches? Most notably, the leading technology companies are predominantly U.S.-based. Most any list of the leading internet and digital technology companies will include few based in Europe. (SAP – a leading enterprise software provider, is a German-based entry in any such list.) It should be remembered that technology involves more than simply internet and digital technology, and there are solid European entries in the automotive, pharmaceutical, biotechnology, and other industry categories. It's also worth noting the EU's success in technology sectors where a high degree of public-private cooperation is more characteristic of the approach – aerospace and basic science, for example. But if the focus is on the leading-edge digital platforms, information technology, ecommerce, and the other areas focused on by the HJC Investigation, Europe lags far behind the U.S. Comparing the two, what would lead one to suggest that the U.S. model should be conformed to the EU approach? Yet this is precisely what the MSRR suggests. This presents important and unavoidable questions for anyone seriously considering whether to support the MSRR recommendations.

Third, and somewhat related to the differences between American and European antitrust approaches, the MSRR does not deal with the critical question of how competing technology companies from other jurisdictions – notably the People's Republic of China – might be affected by structural dissolution or heavy restriction of the competitive conduct of U.S.-based technology companies. In myriad ways, China supports its indigenous technology companies not only within China but also as they venture out to compete in other jurisdictions. Is it possible that heavily restricting U.S. companies under antitrust law, or even dissolving those companies, would simply lead to domination of their markets by Chinese competitors? If the ultimate outcome of a radical revision of U.S. antitrust practice in regards to the technology sector (and otherwise) is to allow Chinese companies to dominate both U.S. and EU markets, that will hardly be regarded as a satisfying victory for today's critics of the U.S. antitrust consensus.

In fact, the criticisms of the MSRR just itemized clearly suggest a different approach: since the evidence heavily supports the notion that the prevailing consensus on U.S. antitrust-law interpretation is a major factor contributing to the success of U.S. technology companies, there might be significant benefits in trying to persuade the EU (and other like-minded jurisdictions) to adopt something much closer to the U.S. approach to antitrust. Perhaps a leavening of the relatively restrictive EU approach to dominant-firm behavior and other competitive conduct, as well as a more transparent and defense-friendly procedural regime, would put European companies in a better position to evolve and compete directly across the broad and dynamic spectrum of high-technology industries. A proposal along these lines was put forward by the International Competition Policy Experts Group in March 2017,[8] but it has not been taken up in the

8 https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

MSRR. The ICPEG proposal was, however, presented to the HJC in the course of its Investigation. Perhaps that aspect can receive greater emphasis in future debates about the best way to employ antitrust policy to shape the competitive future of one of the U.S.' most valuable and productive economic sectors. ■