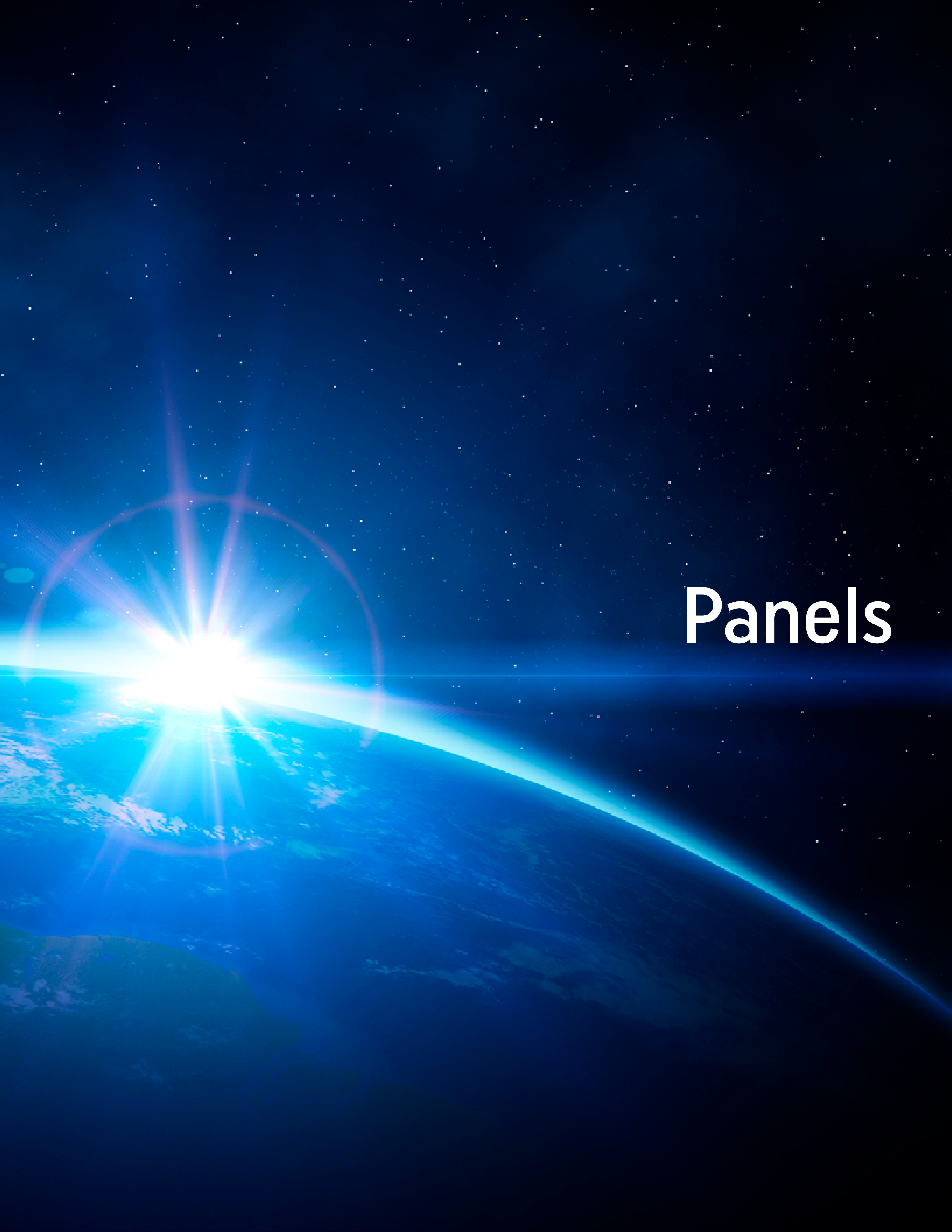
CHALLENGES TO ANTITRUST IN A CHANGING ECONOMY

Harvard Law School
November 9, 2019
Post-Conference Summary

Program

Program

8:00 - 8:40am	REGISTRATION & BREAKFAST
8:40 - 8:45am	PROGRAM OPEN **Einer R. ELHAUGE** Professor of Law, Harvard Law School
8:45 - 9:00am	WELCOMING REMARKS **John F. MANNING,** Morgan and Helen Chu Dean and Professor of Law, Harvard Law School
9:00 - 9:15am	INTRODUCTORY REMARKS **Edward J. BLACK,** President & CEO, CCIA
9:15 - 10:30am	PANEL 1: COMPETITION, CONCENTRATION & COMMON OWNERSHIP: WHAT ARE THE ANTITRUST IMPLICATIONS? **Hadiye ASLAN,** Assistant Professor of Finance, J. Mack Robinson College of Business, Georgia State University **Einer R. ELHAUGE,** Professor of Law, Harvard Law School **Martin C. SCHMALZ,** Associate Professor of Finance, Saïd Business School, University of Oxford **Lucian A. BEBCHUK,** Professor of Law, Economics, and Finance, Harvard Law School ***Moderator: Terrell MCSWEENY,*** *Partner, Covington & Burling*
10:30 - 10:45am	COFFEE BREAK
10:45 - 12:00pm	PANEL 2: COMPETITION IN DIGITAL ADVERTISING: IS THERE ONLINE AND OFFLINE CONVERGENCE? **Gregory K. LEONARD,** Partner, Edgeworth Economics **Steve TADELIS,** Professor of Economics, Business and Public Policy; Chair in Business, University of California Berkeley Hass School of Business **Daniel FRANCIS,** Associate Director, Digital Markets, US FTC **Christopher S. YOO,** Professor of Law, Communication, and Computer and Information Science, Penn Law ***Moderator: David MCLAUGHLIN,*** *Reporter, Bloomberg*
12:00 - 12:30pm	LUNCH
12:30 - 1:30pm	A FIRESIDE CHAT WITH... **Noah J. PHILLIPS,** Commissioner, US FTC **Nikhil SHANBHAG,** Vice President, Competition & Telecommunications Law, Facebook **William E. KOVACIC,** Director, The GWU Competition Law Center ***Moderator: Leah NYLEN,*** *Chief Global Antitrust Correspondent, MLex*
1:30 - 2:45pm	PANEL 3: THE ECONOMICS BEHIND DIGITAL SERVICES: HOW DO THEY COMPETE? **Catherine TUCKER,** Professor of Management, MIT **Hal VARIAN,** Emeritus Professor of Business, Economics, and Information Management, University of California, Berkeley; Chief Economist, Google **Howard SHELANSKI,** Professor of Law, Georgetown Law; Partner, Davis Polk **Jonathan B. BAKER,** Research Professor of Law, Washington College of Law, American University ***Moderator: Susan A. CREIGHTON,*** *Partner, Wilson Sonsini Goodrich & Rosati*
2:45 - 3:00pm	COFFEE BREAK
3:00 - 3:30pm	KEYNOTE SPEECH **Makan DELRAHIM,** Assistant Attorney General, US DOJ
3:30 - 4:45pm	PANEL 4: FTC HEARINGS & OTHER ONGOING CONSULTATIONS **Philip MARSDEN,** Professor of Law and Economics, College of Europe; Deputy Chair of Enforcement Decision Making Committee, Bank of England **Reiko AOKI,** Commissioner, JFTC **Henri PIFFAUT,** Vice President, Autorité de la Concurrence **Geoffrey A. MANNE,** Founder & Executive Director, International Center for Law & Economics **Derek W. MOORE,** Attorney Advisor, Policy Planning Office, US FTC ***Moderator: D. Daniel SOKOL,*** Professor of Law, Levin College of Law, University of Florida
4:45 - 6:00pm	PANEL 5: FORMER ENFORCERS´ ROUNDTABLE **Allan FELS AO,** Professor of Law, University of Melbourne **A. Douglas MELAMED,** Professor of the Practice of Law, Stanford Law School **Bill BAER,** Partner, Arnold & Porter **Maureen K. OHLHAUSEN,** Partner, Baker Botts ***Moderator: Jon LEIBOWITZ,*** *Partner, Davis Polk*
6:00 - 6:30pm	COCKTAIL RECEPTION



Panels

Introductory Remarks

Professor **Einer Elhauge** and Dean **John F. Manning** of Harvard Law School started the conference with introductory remarks. Prof. Elhauge and Dean Manning underlined the growing relevance and importance of antitrust in digital markets at the political level, and the resulting growth in interest in the discipline.

Mr. Edward J. Black (CCIA) opened by referring to the recent FTC and Congressional inquiries into large technology companies and their counterparts in other countries and noted the CCIA's participation in proceedings involving such companies over the term of CCIA's existence. Mr. Black underlined the importance of elevating the discussion to fact-based analysis to determine whether or not competition is in fact working. Technological progress inevitably leads to "winners" and "losers" and this, in turn, results in friction. But consumers have benefited from innovations across a variety of sectors, including not only online services like the web, streaming media, and social networking (among others), but also in other sectors like agriculture and healthcare.

There has been a societal shift in terms of access to information and democracy (with a small 'd'). Technology industries account for an increasing share of the economy in terms of GDP and employment, and R&D continues to abound. Authorities ought to be aware of this.
Digital markets of course raise implications for economic redistribution and political and economic power. In this connection, it is encouraging to see that many players in digital markets are adopting an approach of "enlightened self-interest," taking into account concerns broader than mere shareholder value. Others, however, seek to use this political moment to hobble disruptive innovations.

All that said, consumer calls for appropriate action have been heard, and regulators have stepped up to the mark. But competition policy is not a multi-tool. It is designed to ensure consumer welfare, not other interests. This is not to say that certain firms should not come under scrutiny, but we cannot drive screws with a hammer.

Before deciding new rules are needed, we need to look at the evidence, and use that as a basis to determine future policies. Where are enforcement actions merited, given the evidence we have? We should use evidence-based antitrust policy, designed to remedy demonstrated problems, rather seeking a preordained outcome.

> *"Competition policy is not a multi-tool. It is designed to ensure consumer welfare, not other interests. This is not to say that certain firms should not come under scrutiny, but we cannot drive screws with a hammer"*

Einer Elhauge
Harvard Law School

John F. Manning
Harvard Law School

Edward J. Black
CCIA

Panel 1

COMPETITION, CONCENTRATION & COMMON OWNERSHIP: WHAT ARE THE ANTITRUST IMPLICATIONS?

Speakers:
Hadiye ASLAN (Assistant Professor of Finance, J. Mack Robinson College of Business, Georgia State University), Einer R. ELHAUGE, (Professor of Law, Harvard Law School), Martin C. SCHMALZ (Associate Professor of Finance, Saïd Business School, University of Oxford), Lucian A. BEBCHUK (Professor of Law, Economics, and Finance, Harvard Law School).

Moderator:
Terrell MCSWEENY, Partner, Covington & Burling.

Terrell McSweeny, opened, noting the timeliness of the issue of market concentration and common ownership, and that despite its growing relevance, it has not seen the detailed discussion it merits.

The panel debated about the following questions.

The panelists have diverging views, but can we identify some zones of agreement? What is "common" or "horizontal" ownership, and has it in fact increased in recent times in the U.S.?

Lucian A.Bebchuk stated that "common ownership" refers to a situation where institutional investors hold stakes in many competitors in the same market. He agreed that there is a rise in institutional ownership in recent decades.

Martin C. Schmalz agreed, stating that "common horizontal ownership" refers to a situation where "influential" shareholder(s) in one firm or more also hold a financial interest in a competitor (whether the investors in question are "institutional" or not). There is ample evidence that such situations have increased in recent years.

Hadiye Aslan concurred, but stressed that the reason that common ownership is attracting attention relates to patterns showing that the level of competition has been declining in the U.S. in various markets (but nonetheless advocated caution in linking these phenomena).

Einer Elhauge noted that one means to assess the degree to which "common ownership" has increased is to look at the degree to which firms place weight on the profit interests of other firms. To take one example, assuming each shareholder's influence is proportionate to its shareholding, within the S&P 500, the average weight that each S&P 500 firm places on the profits of rivals in the same industry has increased from 30% in 1980 to 75% in 2017. In other words, each S&P 500 firm now places as much weight on their rivals' profits as if they owned 75% of their rivals' stock. This is true under various models of shareholder influence. The primary driver for this is the increased diversification of all institutional investors.

We have some agreement that there is an increase in horizontal overlaps, but is this a new competition concern?

Einer Elhauge noted that this is an old concern. The 1890 Sherman Act and 1914 Clayton Act were in fact designed to deal with this very issue. It is true that, back then, the concerns related to unitary actors, whereas now we are dealing with the collective interests of various institutional and other shareholders. In academic literature (e.g. Prof. Rotemberg's work in the 1980s), the idea has also long existed. Today, the rapid rise in horizontal shareholdings, along with recent academic empirical analyses, has made this a live issue again.

Hadiye Aslan agreed that this is not a new issue. For example, the notion of modified HHIs derives from empirical studies dating back for years.

Martin C. Schmalz drew parallels with the notion of "private socialism" or "pension fund socialism," which can have anticompetitive effects. Lowering the costs of diversification may naturally reduce competition and reduce welfare.

> *"Just like effects of horizontal mergers can vary in effect across markets, so can the effect of horizontal ownership. This is one of the most important antitrust problems at present, largely because nothing is being done about it."*

The degree of diversification of a given fund may affect its degree to cause potential anticompetitive harm. There are many papers that have reviewed this correlation.

Lucian A. Bebchuk agreed the idea is not new, but what is new is that recent literature has argued that this not a merely theoretically possible effect, but that it is a first-order effect that deserves the attention of policymakers. This is where the disagreement begins.

Is there any reason to believe that if common ownership would have an effect, would it be "monumental," or would there be differences across different industries?

Lucian A. Bebchuk stated that in his view there is no real effect in any industry. If there would be any effect, it would be different across different industries. And it would be good that it should receive less attention.

Martin C. Schmalz stated that it is hard to believe that the effect would be uniform across markets. It could affect many industries, but it would be more pronounced in certain industries and markets.

Hadiye Aslan agreed, stating that the effect can vary across or within markets.

Einer Elhauge stated that just like effects of horizontal mergers can vary in effect across markets, so can the effect of horizontal ownership. He further stated that this is one of the most important antitrust problems at present, largely because nothing is being done about it.

What are the incentives of index fund managers to influence corporate conduct?

Lucian A. Bebchuk took the view that you need to look inside the box of the institutional investors and look at the incentives of the actual managers. He noted that in his recent paper, he showed that managers have incentives not to get involved and to be deferential to corporate managers. Institutional investors are therefore unlikely to influence companies with respect to competition, including in common ownership scenarios. Based on his review of the evidence, common ownership is unlikely to produce first order effects. In particular, in his view, there is no evidence of anticompetitive effects: in reality, common ownership is in fact pushing managers to perform better. He underlined the risk that the literature and attention on common ownership could push investors in the wrong direction.

Martin C. Schmalz stated that he did not think there is a contradiction between his view, as expressed in his recent airlines paper, and Prof. Bebchuk's. In his view, there is no need to focus on index funds. In his paper, he showed, with a mathematical proof, that there is no contradiction

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between limited or no engagement by common owners and anticompetitive effects. His argument is that precisely because common owners are not active, there can be anticompetitive effects.

Einer Elhauge stated that the causal mechanisms for common ownership effects are well established and noted seven such mechanisms. First, concerning board elections – there is empirical evidence that from 1993 on, industry performance was used as criteria to oust board members as much as individual performance. Second – concerning executive compensation – Mr. Bebchuk's own evidence shows that industry performance is used to determine executive performance. As common ownership increases, this phenomenon also increases. Third – concerning control contests – managers want institutional investors to back them and there is anecdotal evidence that large horizontal shareholders have defeated measures that would cause more aggressive competition. Fourth – in relation to the stock market – managers do not want common owners to drop stock and reduce its value. Fifth – concerning the labor market – managers in one firm will likely have to deal with the same common shareholders in their next firm. Sixth – there can be direct communication with other firms. Seventh, there is evidence that common ownership can produce reduced incentives to compete. In sum, in Prof. Elauge's view, there is copious evidence that shows that common ownership has an effect in practice.

Hadiye Aslan summarized her recent paper, which sought to show if the effects in the airline data were borne out in other industries. She looked specifically at effects in consumer goods markets. The results turned out to be smaller, but nonetheless existed.

Lucian A. Bebchuk first made two preliminary comments: First, it is important also to note the part of his analysis that shows funds may be excessively deferential to managers (beyond being passive). Second, he noted that the evidence shows that the effects of index funds are much more limited. Returning to mechanisms, in particular executive compensation, prior to the rise of common ownership, pay was less sensitive to performance (e.g. in the 1980s). Moreover, if institutional investors were really interested in preventing competitive behavior, there are plenty of things they could do, but there does not appear to be evidence of it. If anything, institutional investor oversight has led to pay being linked to performance more and more. It may not yet be enough, but the direction is different to that predicted by the common ownership literature.

Martin C. Schmalz noted that many things have changed over time. Common ownership has gone up, in parallel with reforms in corporate governance. He agreed that investors may push for better executive pay, but their incentives are insufficient. Conceptually, observing a mechanism is not the same as saying it does not exist. In economics, observing the incentive is observing the phenomenon. The aim is not to show actual records of behavior, but to show the existence of incentives. In addition, the phenomenon is not limited to index funds. BlackRock and Berkshire Hathaway are not index funds, for example. Further, indexing and common ownership have nothing to do with each other.

What should antitrust law do about this debate?

Einer Elhauge stated that enforcers should apply the Clayton Act, on a case by case basis, for starters. This is not calling for the end of index funds or efficient diversification. For example, it may be possible to end common ownership by activist funds. Or rules could be applied to fund families – but allowing funds to vote individually. At the very least, common ownership needs to be taken into account in mergers. Current guidelines affirmatively assume that common shareholding has no effect, but so many mergers have been approved that led to increased prices.

What should the policy response be?

Hadiye Aslan stated that regulation of funds may produce consumer harm, but increased prices also hurt consumers. An in-depth welfare analysis would be required to show where the costs and benefits would be distributed.

Martin C. Schmalz declined to voice an opinion on what policymakers should do. But logically there are only two options: either you want to decrease industry level diversification, and alternatively you take away control rights from common owners. If you get away from diversification, you would end up with larger shareholders. The al-

"Regulation of funds may produce consumer harm, but increased prices also hurt consumers. An in-depth welfare analysis would be required to show where the costs and benefits would be distributed."

ternative (taking away control rights) would change the equilibrium of shareholders, and it could end up with the same result. This is very difficult to model.

Lucian A. Bebchuk stated that any policy proposal would likely have many effects. At this stage, there should be no policy responsiveness, because it is likely to push investors in the wrong way (e.g. to become more deferential to management). In terms of antitrust, there may be other policy tools that are more appropriate. For example, the first-order priority of enforcers should be more strict on mergers in general.

What are the unanswered questions? What more do we need to know surrounding this issue?

Einer Elhauge stated that it would be good to have a retrospective study of mergers taking into account horizontal shareholdings to determine whether it in fact would have made a difference. Also, studies are now limited to industries with available pricing data (but the FTC could request proprietary data). Further, we may need to look at filing rules (e.g. the 15% cap in the U.S.) so that agencies are at least informed about the risks in common ownership scenarios.

Hadiye Aslan stated that more data-based research is needed, in different industries, and more welfare studies would be welcome.

Martin C. Schmalz noted that there is no research done on private firms, particularly private equity funds. Also, research on welfare effects is needed – for example, there may be situations where common ownership can have welfare-enhancing effects, but the data are not there.

Lucian A. Bebchuk stated that more work is needed on the causal mechanisms.

“Research on welfare effects is needed – for example, there may be situations where common ownership can have welfare-enhancing effects, but the data are not there.”

AUDIENCE QUESTIONS

If the government wanted to solve the problem of common ownership, starting with banking, what government agencies should be involved?

Einer Elhauge stated that it is unlikely that the SEC would be involved. That said, there may be a need for banking regulators to be involved to get dual approvals for banking mergers.

If the problem primarily exists in concentrated markets, how can we be sure that the cause is in fact the common ownership?

Einer Elhauge stated that it is down to a question of empirics: you can control for the effect of concentration and see if common ownership increases the risk of anticompetitive outcomes. Ultimately, this is a unilateral effects model, and decisions need to be based on the facts.

Martin C. Schmalz speculated that one could also imagine a story whereby common ownership can facilitate coordinated effects.

You mentioned product innovation. What about innovation in management styles and monopsony effects?

Martin C. Schmalz stated that in the evidence he has reviewed, there were some effects in management types in industries with common ownership, but that this evidence is limited.

Returning to unilateral v. coordinated effects: Do the unilateral effects being considered here have any bearing on the legal standard to be used for oligopoly pricing?

Einer Elhauge took the view that there is limited evidence to call for a new oligopoly standard.

Panel 2

COMPETITION IN DIGITAL ADVERTISING: IS THERE ONLINE AND OFFLINE CONVERGENCE?

Speakers:
Gregory K. LEONARD (Partner, Edgeworth Economics), Steve TADELIS (Professor of Economics, Business and Public Policy; Chair in Business, University of California Berkeley Haas School of Business), Daniel FRANCIS (Associate Director, Digital Markets, US FTC), Christopher S. YOO (Professor of Law, Communication, and Computer and Information Science, Penn Law).

Moderator:
David MCLAUGHLIN (Reporter, Bloomberg).

General overview of the markets

Gregory K. Leonard noted that in the overall advertising market, it is obvious that internet advertising has exploded, particularly since 2007. Print expenditure is declining, but TV is broadly stable. Overall expenditure has increased, and internet advertising has expanded the market.

Ads are essentially differentiated products. And new products can expand the market. Studies show that internet and print ads are good substitutes. Further, since 2010, rates for TV ads have decreased, and it seems internet ads have had an impact here.

> *“A heavy hand by regulators would stifle this. There must be an understanding of what the anticompetitive conduct is before there is any action.”*

The issue here is whether internet advertising should be seen as a separate market from print, TV and so on? Or are these different aspects of the same market?

> *it is almost certain that from an antitrust enforcement perspective that there is not a single overall market. Antitrust looks to particular practices by particular companies, in particular markets.*

Christopher S. Yoo noted that there is a lot of economics literature on broadcasting that has been forgotten. Moreover, there is literature on online/offline advertising substitution. There is evidence that there is some substitution. In addition, there may be convergence between different types of online advertising, e.g. search v. non-search. Ultimately this is an empirical question, but there does not appear to be sufficient evidence to reach firm conclusions.

Steve Tadelis recalled that essentially, advertising is about attention. There has been a shift towards online forms of advertising, but that could equally change.

Christopher S. Yoo noted that some companies, notably P&G, shifted some of their advertising budget from online to offline in recent times. The products being advertised are highly differentiated, and so are the consumers that are being targeted by those advertisements. This is a highly complex, empirical question.

Given the power of Facebook and Google, effectively a duopoly, what are the issues we need to worry about?

Christopher S. Yoo noted that even if there are strong market shares in certain advertising segments, this is not a problem in and of itself – there must also be objectionable conduct.

Steve Tadelis recalled that being a big company is not illegal and neither are high prices per se illegal in the US. Online, prices are paid through auctions, which determines willingness to pay. Recently, the largest US newspaper company concluded that it would lose revenue if it stopped using Google. But measuring ad returns is hard and ad consultancies appear to be running mindless regressions.

This is a new arena with a tremendous amount of innovation. A heavy hand by regulators would stifle this. There must be an understanding of what the anticompetitive conduct is before there is any action. The companies merit scrutiny but there must be a valid theory of harm.

Christopher S. Yoo noted that some people complain about the lack of alternatives to Google, but as long as Google got its position through competition on the merits, this should not be problematic. As long as there are no structural problems (e.g. no artificial barriers to entry) this should not be problematic.

Gregory K. Leonard stated that it is clear that there is a lot of value being generated through the additional advertising dollars in the market.

Daniel Francis took the view that it is almost certain that from an antitrust enforcement perspective that there is not a single overall market. Antitrust looks to particular practices by particular companies, in particular markets. There are two broad categories of ways regulators might be interested. First, it is common for there to be free user-facing markets and an advertising side. For example, exclusionary conduct on the user side might be expressed on the advertising side (e.g. via price effects). Second, it is possible for companies to engage in practices throughout the adtech chain, e.g. horizontal collusion (see the 1-800 Contacts case, concerning collusion in the purchase of ads). Acquisitions can also be problematic. Uses of contractual restraints such as exclusivity or MFNs can be problematic. Dominant platforms may prohibit multihoming or targeting rivals by denying them access to an output.

Why has this sector attracted so much focus lately?

Daniel Francis noted that this is a very big question. There are all kinds of political and media discussions, but the antitrust question needs to be focused on antitrust questions and be politically neutral to maintain the confidence of the community and the courts. The antitrust conversation is dominated by big tech at the moment, but there is a store of antitrust questions that are getting less attention than they deserve at the moment.

> *It is normal to see winners and losers in various industries. The question is whether there is harm to consumers. Losing a choice (as in the Google/YouTube example) is not by itself consumer harm. The welfare effects can be ambiguous or even welfare-enhancing.*

Christopher S. Yoo also noted that there is clearly a political dimension to this question (even some within DG Comp acknowledge this). There is a question in Australia concerning the motivation for the digital market inquiry. The Furman report is also interesting – some people suggest that the new proposals would make no difference, but then why propose them? In addition: It is clear that new ad technology results in a total surplus, but this does not mean there is necessarily a consumer surplus. This needs to be analyzed.

Have you actually seen any conduct that merits enforcement?

Steve Tadelis stated that he had not. To take one example, in a study he did for eBay, it could be seen from fine-grained data that the ROI on certain customers was very high, but very low for others. This type of data is not always available. He also noted that many advertisers buy via intermediaries. If intermediaries were to become larger, this could lead to buyer power. Things change very fast in the tech industry. With the advent of cloud competing, capital expenditure becomes operating expenditure. This could create a very shifting landscape. It is very difficult to predict the next five years.

Gregory K. Leonard noted that there are also a lot of economies of scope online. Amazon, for example, is selling a lot of advertising. Competition can come from anywhere.

But others complain that "adtech is a graveyard". For example, Google requires people to use its ad tools on YouTube?

Steve Tadelis stated that he saw no evidence of barriers to entry. The literature on "killer acquisitions" is based on pharma, where the likelihood of a shelved product being resurrected is very low due to the need for testing, market authorizations, etc. This does not work in tech, because anyone can recreate a product using cloud services. Accordingly, the acquirer would have an incentive to bring it to market. Many great ideas fail in execution. But Google, Facebook, Amazon, and so on, have experience in execution.

Christopher S. Yoo stated that he is untroubled by the death of the independent adtech industry. It is normal to see winners and losers in various industries. The question is whether there is harm to consumers. Losing a choice (as in the Google/YouTube example) is not by itself consumer harm. The welfare effects can be ambiguous or even welfare-enhancing.

Gregory K. Leonard stated that in the end, advertisers care about getting to YouTube, not how they get to YouTube.

Steve Tadelis stated that the devil is in the details. Antitrust is about promoting the competitive process, not minimum wages, equality or health. These are important objectives, but they are not antitrust problems. People complain that online ad auction or targeting mechanisms are opaque, but it is important to recall that the platforms primarily provide services to users (not advertisers). If advertising reduces the quality of the user experience, users will go away, so there is some need to maintain opacity on the ad side to prevent abuses. For example, there needs to be protections against "hit and run" businesses.

> *"The devil is in the details. Antitrust is about promoting the competitive process, not minimum wages, equality or health. These are important objectives, but they are not antitrust problems."*

AUDIENCE QUESTIONS

It is surprising that all panelists assumed that advertising is pro-competitive. But some literature shows that advertising can be harmful or manipulative?

Steve Tadelis noted that there is a difference between consumers buying something they don't need and anticompetitive conduct. There may be a need for other regulation, but this is not a competition problem.

Christopher S. Yoo stated that this sounds more like a consumer protection problem (e.g. the FTC's subliminal advertising ban).

Daniel Francis concluded by noting that the core case in antitrust enforcement actions concerns truthful advertising, not deceptive or otherwise misleading advertising. Further, it is a dangerous thing for an antitrust enforcer to distinguish between "good" demand and "bad" demand. Unless there is illegal commerce, the FTC should enforce any type of violation equally vigorously.

Advertisers use different ad auction designs, e.g. generalized second price or Vickrey auctions. But this may in some cases cause harm to advertisers. What are the panel's views?

Steve Tadelis noted that it might well be that Google did research on ease of participation. It could be that ease of participation increased revenue for Google. Even if Google got slightly higher prices, it is hard to say that this produces adverse welfare outcomes.

Mr. Francis, one of the best FTC initiatives was the "do not call" list, but another kind of fraud has appeared, i.e. spoofing caller IDs? Is the FTC doing anything about this?

Daniel Francis noted that the Bureau of Consumer Protection spend a lot of time on unfair practices that could include this. That said, naked deception can constitute anticompetitive conduct for the purposes of Section 2 in certain circumstances.

Prof Yoo concluded, noting that there is a difference between individual acts of fraud and systemic violations. But there is some theoretical overlap between them.

A FIRESIDE CHAT WITH...

Speakers:
Noah J. PHILLIPS (Commissioner, US FTC), Nikhil SHANBHAG (Vice President and Associate General Counsel, Competition and Regulatory Law, Facebook), William E. KOVACIC, (Director, The GWU Competition Law Center).

Moderator:
Leah NYLEN, Chief Global Antitrust Correspondent, Mlex

Do you think self-preferencing can be considered an antitrust violation? Why or why not? And if so, in what circumstances?

Nikhil Shanbhag opened, noting that this type of allegation has been seen in various parts of the world, notably Europe, but we don't know how this will play out in the courts. But what we don't know yet is in what circumstances self-preferencing can be an antitrust violation. We don't have a framework to distinguish legitimate product design from an anticompetitive abuse. Hopefully the court cases will put some meat on those bones. There are some moves to look at this in a regulatory lens, such as the EU business to consumer directive. Those are an interesting set of approaches that could provide more guidance.

Noah Phillips stated that there perhaps shouldn't be a categorical rule to state that self-preferencing cannot be an infringement. Self-preferencing isn't anything new in the economy. We can see it in many places in the economy and it can be anti- or pro-competitive. In a given case, distinguishing between what is pro- and anti-competitive can be difficult on the facts. It will depend on the dynamics of particular platforms and particular markets.

Given the breadth of the question, it is hard to have a specific answer. The Microsoft litigation is a guideline case, but it is not clear that only tying could amount to problematic self-preferencing. It will depend on the facts of the case.

> *“ The devil is in the details. Antitrust is about promoting the competitive process, not minimum wages, equality or health. These are important objectives, but they are not antitrust problems. ”*

> *"It seems perverse to deal with competition problems by preventing the entry of private brands, as such entry might drive down prices and foster competition. There needs to be a focus on the nature of the harm and consideration of proportionality."*

Bill Kovacic noted that one key factor is whether the platform provider pitches its results in a neutral manner, or whether it explicitly says that its products are more favorably displayed. It depends on how the platform holds itself out. He agrees that the DC Circuit *Microsoft* decision is a good framework for working this out. There also needs to be an examination of justifications to determine whether the user experience is better as a result of the conduct.

One example of where self-preferencing may be a good thing to the extent that the creation of the platform is partly pursed as a means to show off the platform's own work, or where the platform owner spots a new opportunity to develop a new capability. It makes sense that they should be allowed to first and foremost pursue this possibility, at the least to the extent that it is still under development. Also, if the platform does not have substantial market power, there is little scope for it to cause harm. This should be used as a first screen.

Noah Phillips stated that we should be wary of confusing abuses of dominance with common carrier obligations – this is a distinct regime.

Bill Kovacic suggested that a helpful way of thinking about this is to compare the situation with one where the platform owner would have no self-interest at all. What would a truly neutral mechanism look about?

Nikhil Shanbhag noted the interesting interplay between the way a platform portrays itself and the question of whether there should be a regulatory neutrality obligation.

Bill Kovacic noted that this consideration overlaps with the Furman Report's call for a neutrality type obligation, or a code of conduct.

What is the best remedy for this type of problem? For example, in Google Shopping there was a remedy allowing for rivals also to appear "in the box". Others call for structural separations. In Microsoft there were conduct remedies.

Bill Kovacic stated that the cleanest solution is likely a structural separation. It is a very inclusive and powerful device. It has been done in many domains of policy regulation.

Noah Phillips added that the Paramount consent decree originally proceeded on a different basis, but in the end the Supreme Court wanted a breakup, i.e. a structural remedy. The real question goes to the nature of the problem being remedied. There also needs to be an assessment of whether the remedy is going to work. Current calls for breakup have the hallmarks of a punishment for wrongdoing, but it is better to focus on the outcomes.

Nikhil Shanbhag noted that from an industry perspective, it seems perverse to deal with competition problems by preventing the entry of private brands, as such entry might drive down prices and foster competition. There needs to be a focus on the nature of the harm and consideration of proportionality. Setting a cutoff based on size seems difficult to police and may set wrong incentives.

Bill Kovacic stated that one healthy outcome of the current debate on the aims of competition law is a reevaluation of past decrees to see whether they served their purposes. For example, Randy Picker has evaluated the AT&T and IBM cases. The 1956 AT&T decree resulted in the Bell Labs IP portfolio being opened up, which was arguably positive, but AT&T was also prevented from competing with IBM in computing, which may have had adverse consequences. In deciding how to set remedies, we need to think carefully about the consequences of taking a potential source of competition out of the market.

One key element of the recent FTC Facebook privacy settlement was to hold Facebook internally responsible for certain potential violations, including violations of privacy rules. What is the precise goal here, and what was the aim of the assessor mechanism?

Noah Phillips noted that one of the goals was to force Facebook management to focus more on privacy questions, using internal mechanisms. There is an analogy with Sarbanes-Oxley, whereby there was internal certification of accounting processes. The idea is to create an equivalent mechanism within Facebook. In parallel, the outside assessor reports to the board externally, with the FTC as the ultimate arbitrator. This creates a series of obligations that will hold Facebook to account. The idea is to add transparency and accountability and incentivize privacy compliance. In addition, there were changes to the board to bolster privacy interests. That said, in some cases, external monitoring is absolutely required.

> *"In deciding how to set remedies, we need to think carefully about the consequences of taking a potential source of competition out of the market."*

“ If the deficit is regulatory, Congress could already deal with it. It is not clear what problem the new agency would address. ”

Bill Kovacic stated that it is somewhat astonishing that conduct-based remedies are written off in many cases. There needs to be evaluation, perhaps over a span of years, to see whether conduct controls can also work. These controls appear to be undervalued. For example, the IBM litigation in the 1970s and the EC enforcement in the 1980s seems to have had effects based on the literature examining them. Similar to the Microsoft case, it seems that the litigation introduced a measure of restraint to the company's conduct that allowed competitors room to breathe. As a result, the litigation is now seen in a more sanguine light even though it was seen as a failure at the time. In reality, it takes time to assess the effects of any given remedy.

Noah Phillips stated that evaluating a remedy is dependent on the metric used to judge it. Some of the criticisms of the Facebook settlement are based on things the case was not actually about.

Bill Kovacic stated that looking at cartel enforcement, you can see that certain companies engage in the same type of misconduct over and again. This begins to look like a business model problem. It is important to look at remedies that identify the lapses at issue, and to address them with appropriate measures. And to evaluate them over time.

In recent reports, there have been calls for a regulator for digital platforms cutting across various policy domains. What are your views on creating such a regulator?

Noah Phillips emphasized the need to assess what precise problems having a new regulator would solve. If the deficit is regulatory, Congress could already deal with it. It is not clear what problem the new agency would address.

Nikhil Shanbhag stated that looking at the broader issues, there is a question as to what types of questions need to be addressed. For example, there are interesting policy questions relating to privacy and data portability. The EU GDPR also raises issues relating to the interaction of privacy and data portability. Facebook has a recent white paper putting meat on the bones of these issues as they relate to social graphs and other structures. There is an interdisciplinary nature to this, touching on consumer protection, privacy and competition. It is best to look at these questions holistically.

Bill Kovacic noted that one motivation for these proposals is to enhance the existing tools. But there is a fundamental choice: you either adapt the existing tools or build a new toolkit from scratch. The FTC would be the natural home for these domains of regulation in the US. If these policy areas are key to the problems identified, why create a new agency rather than expand and grow the existing framework? Similarly, in the UK, the CMA or Ofcom could address these issues. The counterarguments are the need to focus on the tech sector, or to ensure that enforcement is sufficiently aggressive. The FTC was very nearly the SEC in the US, for example.

Some say the existing regulators have been insufficiently aggressive. Do you agree?

Noah Phillips took the view that it is fair to say that some of the agencies may have missed some issues. But today the FTC, for example, is very focused on these key issues. The agency is beginning to respond. There is a new tech enforcement division. The FTC has a long history of examining the issues and assessing whether new measures need to be taken.

Bill Kovacic noted the trend today to burn down existing structures in light of perceived inadequacies and calling them “corrupt” or “unfit for purpose.” It is not necessary to rubbish everything that exists in order to bring about reform. The criticism is too blunt and categorical. Looking at the Furman Report, the key section is “Implementation.” It is unclear what the portfolio of any new agency would be, or how it would be structured. How to deal with issues of capture? In the US, given the current discourse, there is a danger of diminishing the role of the FTC.

Noah Phillips concluded that the current discourse lacks nuance. There is a need to actually discuss the substance of the issues of regulatory and institutional design.

What is the role of national security considerations in antitrust enforcement? See for example the blocking of the Broadcom/Qualcomm takeover, and recent interventions in the Qualcomm litigation. If they have a role, who is best placed to take them into account?

Noah Phillips started by discussing the Broadcomm/Qualcomm transaction, which was blocked by the Committee on Foreign Investment in the US (“CFIUS”). This appears to be an appropriate forum for these concerns. Looking at national security in the antitrust context risks muddying the issues. Separate bodies make sense.

Nikhil Shanbhag agreed that it makes sense to keep these issues separate. Competition enforcement is best limited to consumer welfare considerations.

Bill Kovacic also agreed. There is however a need for better explanations and transparency as to why certain transactions are blocked on competition grounds. CFIUS is headed by the Treasury Department, which is likely to be one of the least sympathetic bodies to the parties. Competition bodies may have a role in spurring decisionmakers to make their analysis explicit. Quite often national security decisions are taken with insufficient reasoning.

AUDIENCE QUESTIONS

CFIUS only deals with foreign investment, but there are many domestic transactions that could have security implications. How should these be dealt with?

Bill Kovacic noted that the Department of Defense may advocate for certain mergers (even in concentrated markets) because they simplify cost management, etc. The dilemma for the agencies is that if it were to come to litigation, they would need to make sensitive arguments. In addition, if there is only one supplier left, there may be no recourse. The United Launch Alliance is a good example of this kind of problem.

Noah Phillips underlined that the Defense agencies are both highly influential, and the key buyer concerned by any such proceedings.

The antitrust laws are of general application and applied by various bodies throughout the country. But perhaps certain substantive rules are required for certain types of businesses (platforms) with vast scale, scope and implications for the economy. For example, the Trinko standard or predatory pricing rules may be appropriate in some contexts, but are not appropriate for platform businesses. As a result, is there an argument that a different agency should be responsible for those rules?

Bill Kovacic noted that this is not a new question, but the recent debate has not seen a meaningful discussion of this real issue. Participants need to meaningfully discuss the best way to implement the law, i.e. broadening the mandate of an existing institution, or creating something new?

Panel 3

THE ECONOMICS BEHIND DIGITAL SERVICES: HOW DO THEY COMPETE?

Speakers:
Catherine TUCKER (Professor of Management, MIT), Hal VARIAN (Emeritus Professor of Business, Economics, and Information Management, University of California, Berkeley, Chief Economist, Google), Howard SHELANSKI (Professor of Law, Georgetown Law; Partner, Davis Polk), Jonathan B. BAKER (Research Professor of Law, Washington College of Law, American University)

Moderator:
Susan A. CREIGHTON, Partner, Wilson Sonsini Goodrich & Rosati

Presentation by Hal Varian – The Seven (Alleged) Deadly Sins of Tech

Mr. Varian opened with a presentation on the seven (alleged) deadly sins of tech, namely 1. Competition, 2. Innovation, 3. Acquisitions, 4. Entry, 5. Switching cost, 6. Entry barriers, and 7. Size.

Competition (in search). Mr. Varian began by noting that general purpose search is a tough business. Just ask AOL, Alta Vista, Ask Jeeves, Yahoo, Inktomi, Excite, Lycos, etc. Why? Because you have to build a system to answer 100% of questions but you only get paid for 6% of clicks. Only 6% of clicks are commercial (resulting in monetizable ads). Competition is therefore intense for commercial clicks: Amazon, eBay, Facebook, Yelp, Travelocity, Expedia, Orbitz, Trip Advisor, and thousands of commercial sites are also active. They want customers to navigate directly to them rather than arrive via a paid click and that requires building a brand. In fact, 35% of online shopping sessions start through direct navigation to a shopping website. Only 8% begin with search ads. In addition, tech firms compete intensely against each other across many sectors, including search, maps, ebooks, office tools, social networks, and countless others. That's why prices are low, and innovation is high. Mr. Varian noted that spending on ads has fallen dramatically in the last decade, down from 1.4% of GDP in the 1950s to 0.96% in the past decade. Moreover, online ad spend has decreased 40% since 2010.

Innovation. Tech companies are highly innovative. Based on Bloomberg statistics, tech companies are the leading spenders in R&D, while government R&D spending is going down. Tech companies therefore play a key role in the innovation ecosystem.

Acquisitions. Mr. Varian noted that most tech acquisitions are best understood as "acqui-hires". For Google, the median number of hires per acquisition is 7.95. Most of Google's acquisitions had 3 or fewer employees: for example, when acquired, Android had a handful of employees and was less than 2 years old. It is much more efficient for Google to acquire a company to hire a handful of employees than it is to interview and hire new employees individually. And Google can scale up new technologies much more effectively. This is an industry-wide trend. There have been over 5 (almost 6) times as many acquisitions than IPOs since 1990. Over 50% of companies say that acquisition is the most realistic long-term goal for their company. Acquisition is now the normal route to success in Silicon Valley.

Entry. The "kill zone" is defined as "areas not worth operating or investing in, since defeat is guaranteed." Google, Apple, Amazon, Microsoft, Facebook, China, Europe, and many others have all announced major AI initiatives. Surely, then, no startup would dare to enter this "kill zone"? But, in reality, the prospect of acquisition helps counteract this. Based on the data, it seems that VC funding is at an all-time high (with the number of 1st rounds higher than ever).

Switching costs. Switching costs are lower than critics imagine. Google has allowed easy data portability with its "Takeout" service since 2011. It allows users to download their data (from up to 70 products) to their desktop, Google Drive, OneDrive, Dropbox, and others. Even then, relatively few users took it up. To help, Google set up its Data Transfer Project to facilitate downloading of data. Google also allows for download of data for research purposes, e.g. images for training AI systems, etc.

Entry barriers. In 2000 a new tech entrant would likely need to invest in fixed costs like data centers, hardware, custom software, and networking. There was a high cost of switching to other technology providers. Today, data centers from Google, Amazon, Microsoft, IBM, et al provide hardware, software, and networking at whatever scale is needed. Everyone now has access to technology that only the richest companies could afford a decade ago. Switching cloud providers is easy due to container technologies. This is not limited to tech services. Companies can outsource other business processes like legal, hiring, customer relations, accounting, marketing, user support, etc.

Size. Tech companies are accused of being too large, but this is not true when looked at in historical context. In terms of the most valuable stock, in 2019, Amazon's valuation is about 3% of the total equity market. But in 1928, GM was 8% of the market, in 1932 AT&T was 13% of the stock market, and in 1970, IBM was 7% of the market. In terms of the revenue of top companies, in 2019, Amazon, Apple, Google, and Facebook's annual revenue was 2.9% of GDP. But in 1969, GM, Ford, GE, and IBM's annual revenues were 5.4% of GDP. And tech markets are very volatile, as can be seen from the failures of AOL, Inktomi, Excite, Lycos, Alta Vista, Yahoo, Kodak, Polaroid, MySpace, Blackberry, Nokia, Nortel, Sun, and others.

In sum, Mr Varian concluded that the seven "deadly sins" of tech are in reality its "heavenly virtues."

Reaction to Mr. Varian's presentation

Jonathan Baker noted that the presentation did not address the real competition issues in tech sectors. There may be multimarket competition in tech, but antitrust markets need to be analysed individually. It is normal to expect companies to enter complementary markets. Also, a firm's contribution to GDP or the stock market says little about potential competition in individual markets.

It is normal to expect some dominant companies in tech markets. They can benefit from network effects and economies of scale and so on. It is not inevitable that firms will become dominant in all technology markets. For example, there seems to be string competition in restaurant reservation services (e.g., it is easy to switch from OpenTable).

But there are markets in which there are dominant companies, due to entry barriers and, importantly, exclusionary conduct. When there are only a few actual or potential rivals there is a risk of consumer harm. In short, we need to think about the antitrust treatment of exclusionary conduct where the technology frontier is expanding rapidly.

Howard Shelanski noted that having large platforms performing a lot of acquisitions can raise serious questions. While Mr. Varian's statistics are interesting, we need to think rigorously about how innovation works in these markets before drawing any conclusions.

One critique is that there is a lamppost problem. The light may be pretty bright in some spaces, e.g. AI, and actors may see reasons to invest in those sectors. There are

> *"At the base level, data produces information, which produces knowledge, which produces understanding, at the top. Entry is successful where an entrant has a better technology than an incumbent to produce this "understanding.""*

some areas that are quite vibrant, but this does not preclude the possibility of dark spots. When one listens to VCs, there is a sense that there are certain areas that VCs steer clear of. It is true that some areas may just not be worth investing in. That may be a consequence of the bar being set very high, but it is concerning that investment would only take place if there was a viable possibility of being acquired. Are there areas where demand for start-up technology is too concentrated, which biases investment decisions? If this is true, some areas are being neglected, and even in those areas where there is activity it may not be the socially optimal investment, because it is being biased by the potential exit paths. This needs to be investigated before we reach any conclusions.

Another point relates to Mr. Varian's point that large platforms are not siloed. This may be true but on a more holistic view the individual platforms lead in a core area and are more fringe competitors in other areas. This is not always true, but on the whole, there is little invasion of others' markets. (The exceptions would be, e,g, messaging). This is not due to collusion, but companies do tend to stay in their own "turf." This leads to the conclusion that the key challenges would be from new startups rather than from the existing large companies.

The issue of exclusion is a difficult one. There can be exclusion and the more concentrated a market is, the more difficult it is to gain entry to a market. As a matter for antitrust, this raises remedial questions if one does conclude that there is exclusion. While exclusion is not always a bad thing, it can be where this is to the detriment of innovation. The question is how to create "rules of the road" for interoperability (as opposed to the classic remedies, which are difficult post-Trinko).

But interoperability should be enabled without blunting incentives. This requires serious thought. If we are to consider regulatory-type remedies, we should consider whether breaking up companies would be consistent with the benefits that interoperability remedies would bring.

Catherine Tucker opened by noting that students in entrepreneurship classes are looking to build Uber-like services for day-to-day tasks – there seems to be a lack of ambition. With respect to the "deadly sins," it might be worth adding two more: network effects and data.

Concerning network effects, they have changed since the Microsoft case. Network effects have escaped hardware. The move to digital platforms has particular implications for switching costs. One example was iTunes – it used to be said that if Amazon offered the same products at half the cost then no one would switch. But this was upended by Spotify. Concerning digital advertising, there are two sides: advertisers and content consumers (or "eyeballs"). Cross-side network effects are produced: the more eyeballs a platform

> *"We need to determine whether there is in fact a trend, rather than generalize from very specific situations."*

has, the more advertisers it will have. A lot has changed in the digital space, which means that it is now possible to track the effectiveness of ads across platforms.
Concerning data, the question boils down to whether it is possible to think of instances where data are (1) unique or (2) imperative, to determine if they are in fact an essential facility. For something to be a barrier to entry, it needs to be the case that only one firm has it. As a consequence, we need to ask when certain types of data will be unique. In some cases, data will be unique – because you need to think about how extensive a person's digital footprint is. If you contrast an emergency plumbing search with a search for a new car, for example, you can begin to conceptualise this problem.

When are data imperative? A recent analysis looked at changes in practices of search engines as regards how long they used user data in Europe. The study showed no change at all in search quality, because the real issue is how search engines understand and use recent and unique data. Another study looked at whether search data could allow researchers to tell whether someone is a woman or a man. On aggregate, the data allowed a 50% success rate – i.e. it was not meaningful. In other words, it depends on how good the use of the data is as much as how much data are available.

Hal Varian stated that it is right that exclusionary conduct is the key issue. Regarding competition across tech companies, it bears emphasis that most shopping sessions begin with direct navigation. This explains why companies invest in their brand in order to become the go-to provider.

There are general search engines and all kinds of specialised sites. But all the money on general search sites comes from specialised searches due to the nature of ads. General search engines need to monetise using specialised search.

In addition, anyone can setup a search engine today. For example, DuckDuckGo is a meta search engine using Bing and Yahoo and differentiates itself using privacy. There is competition in that dimension of user privacy. But it exists because the pieces to build it are available to anyone.

With respect to innovation, he noted the example, in addition to GAFA, that the car industry is investing heavily in R&D due to threats from autonomous vehicles and electric cars. Much of the battery innovation comes from software innovation in the phone space (battery optimisation).

With regard to operating systems, there are multiple systems on the market today. Apps can be cross compiled across different platforms, and user interfaces are similar. This is what matters to consumers.

Google has been a leader in promoting interoperability. This also applies to cloud computing. Cloud applications are increasingly developed in containers that can be switched between multiple cloud providers. Google has contributed to the development of portable containers. This is because Google is in fact a smaller player in cloud computing and wants it to be easy to migrate to Google.

On network effects, information sciences talk of the "data pyramid." At the base level, data produce information, which produces knowledge, which produces understanding, at the top. Obviously, incumbents have some advantage. Entry is successful where an entrant has a better technology than an incumbent to produce this "understanding." See, for example, Amazon effectively competing with a strong incumbent (Walmart) due to its technological advantage.

It is very important to recognise that hiring is not necessarily acquiring a technology, it is hiring a set of engineers. It is rare to hear managers complain about lack of data, but they will complain about lack of data engineers.

Regarding acquisitions, it has been a long-time practice for bigger tech companies to engage in hundreds of acquisitions. Is there some reason to believe that this problem is somehow worse now?

"In short, there are strong arguments that it is competition that spurs innovation and productivity."

Howard Shelanski questioned whether the problem is in reality any worse now. The ability to outsource and scale efficiently is more salient in IT than in other sectors. There is more of a belief that because of these virtues, competitors are more likely than in other sectors to be truly "nascent" competitors. There is some concern that in the past we have missed the counterfactual (see e.g. the Furman Report). In other words, the threat could come faster than in other markets, making incumbents more likely to act to acquire threats. There are problems with this argument. For example, there is the strong argument that "killer" acquisitions will turn out to be a game of "whack-a-mole" (i.e. that if you acquire one competitor another with rapidly turn up), which, if true, would render killer acquisition strategies irrational. This implies that most of these acquisitions are in fact designed to bring in new talent and expand the user experience, rather than being "killer" acquisitions.

Another concern is optical. There are a couple of situations that either were or were perceived to have been "bad" acquisitions that were permitted, and commentators generalized to conclude that there was a broader problem. We need to determine whether there is in fact a trend, rather than generalize from very specific situations.

Regarding investment, there appears to be some places where innovation is taking place at a higher rate than in others. If we had more aggressive enforcement, would there be more innovation? Or is there a risk of harming innovation?

Jonathan Baker underlined that there needs to be a case by case analysis. There will be times when certain practices reduce the cost of R&D. But the argument really should be about overall industry incentives to innovate. Even if you forbid exclusionary conduct, a dominant firm could still get a large benefit from successful R&D overall. And in addition, there could be countervailing factors, i.e. rivals may have increased incentives which in turn would lead to higher incentives for the incumbent to innovate. Also, innovation isn't the whole story – there are also price effects. In short, there are strong arguments that it is competition that spurs innovation and productivity rather than the ability for incumbents to recoup on specific investments.

Hal Varian referred to the Xerox example. Xerox's enforcement of its patents led to innovations in other fields like inkjet printing and color printing and so on. Also, disincentivizing acquisitions might result in less innovation because not every firm is going to get an IPO. There has to be a "second" and "third" prize to give incentives for entrants.

Some final remarks

Catherine Tucker stated her astonishment at how often entrepreneurs assume they will be acquired by Facebook or Google. As a result, it appears that this seems to be an incentive to enter the industry and to innovate.

Howard Shelanski returned to the notion of whether enforcing exclusionary conduct could affect incentives to innovate, there are two models. The first is the interconnection model, as in with mobile providers. This requires little investment or price effects. This appears to be low-hanging fruit. The second is the unbundling model. This involves granting access and determining pricing aspects for aspects of networks and is much more difficult to weigh up. In summary, the closer we can stick to the interconnection model in our discussions, the less fraught they will be.

"The closer we can stick to the interconnection model in our discussions, the less fraught they will be."

Keynote speech by Makan Delrahim

"BLIND[ING] ME WITH SCIENCE": ANTITRUST, DATA, AND DIGITAL MARKETS

Good morning. Thank you, Einer, for that introduction and thank you to Harvard Law School and the conference organizers for inviting me to be with you today. It is a pleasure to discuss antitrust in the changing economy, especially in the company of so many distinguished guests from the global antitrust community.

I am especially delighted to see old friends, including current and former enforcers, as well as distinguished scholars whose thinking and writing, at times, have helped inform my own views about antitrust policy. I very much look forward to reading and to hearing their remarks today.

As you may know, I have had the privilege of serving as the Assistant Attorney General in charge of the Antitrust Division for just over two years. Each day brings fresh challenges – and no two days are ever alike.

There is one thing, however, that has remained remarkably consistent during my tenure, and that is the public's keen and growing interest in the intersection of the digital economy and antitrust policy. This should come as no surprise. In many ways, the rise of digital markets has defined commerce in this century and, undoubtedly, it will continue to shape our economy going forward.

"In many ways, the rise of digital markets has defined commerce in this century and, undoubtedly, it will continue to shape our economy going forward."

We recognize digital markets for the benefits they offer consumers, as well as the real questions they raise about the formation and exercise of market power.

It is unquestionable that digital technologies have ushered in a wave of creativity, innovation, and opportunity. They can ease the transaction costs of buyers and sellers, and they sometimes cause newer, emerging markets to atomize and take hold.

Yet, it bears repeating that the digital marketplace is not immune from anticompetitive transactions or conduct. Antitrust enforcers cannot turn a blind eye to the serious competition questions that digital markets have raised. That is especially true as we confront mounting evidence about sustained high market shares and potential anticompetitive behavior in digital spaces. In digital markets, as in any other sector, antitrust enforcers must be prepared to uphold the law when companies unlawfully acquire, enhance, or exercise monopoly power.

The potential antitrust issues that can arise in digital markets are numerous. Today, I will focus on how we might think about data, arguably the most transformative input in the digital marketplace.

By now, many of you have read or heard that data is often analogized to oil for its ability to herald the next Industrial Revolution. It is both a key input and a high-value product of the digital economy. Indeed, some of the most interesting, and in some cases alarming, legal issues in the digital economy lie in the collection, aggregation, and commercial use of consumer data.

The collection, aggregation, and commercial use of data have created dynamic product offerings that deliver benefits to consumers. Need a ride? Your current location data can help get a driver to you within minutes. Looking for a new outfit? A recently pinned image can help suggest new staples for that evolving wardrobe. Looking for a place to dine? You get the picture. Admittedly, these uses can be relatively innocuous or actually beneficial in some contexts, and more alarming in others.

The aggregation of large quantities of data can also create avenues for abuse. That is especially true when the consumer data that is collected, aggregated, and analyzed for commercial use is quite personal and unique in nature. Such data, for example, can provide windows into the most intimate aspects of human choice and behavior, including personal health, emotional well-being, civic engagement, and financial fitness. It is becoming increasingly apparent that this uniquely personal aspect of consumer data is what makes it commercially valuable, especially for companies that are in the business of directly or indirectly selling predictions about human behavior.

Competition law enforcers must carefully understand such business models. Moreover, we cannot afford to be overly formalistic in assessing the potential harms that may be attendant to these kinds of business practices. Today, the extraction of monopoly rents may look quite different than it did in the early 20th century. Therefore, it is not surprising that data and its market value as an asset class would raise competition concerns. After all, antitrust properly understood promotes consumer welfare in all its forms, including consumer choice, quality, and innovation.

> *“Antitrust properly understood promotes consumer welfare in all its forms, including consumer choice, quality, and innovation.”*

As we seek a more informed and market-based discussion about the digital economy, we need to be careful with our nomenclature. We often hear about antitrust and privacy concerns in the context of “Big Data.” That term unites much under a vague name. Accordingly, its use and meaning fluctuates, often making it too blunt a term to capture fully the nuances of the modern information-based marketplace. That reminds me of an important observation from my friend, European Union Vice President and Commissioner Margrethe Vestager, who noted the importance of keeping the conversation complicated. Oversimplifying the intersection of data, competition, and digital privacy into a term like “Big Data” can cause us to miss key insights.

Data scientists conceive of data along dimensions often referred to as the three “V’s”: the volume of data; the variety of data; and the velocity of data, which refers to how quickly data is generated and collected. Sometimes there is also discussion of a fourth V, related to the value of the data. Each of these dimensions may permit a company to glean insights that strengthen a digital product or service. Those insights can be passed onto consumers for procompetitive reasons, or they can be used to harm consumers by diminishing a key element of competition.

Not everyone is concerned about data collection. Some observers suggest it has been happening for decades and therefore antitrust concern about it now is somehow misplaced or overstated. These observers point, for example, to the grocery store that has always collected information about consumer purchasing patterns through loyalty cards, often without consumer complaints – other than getting those very long receipts at checkout.

In my view, however, this analogy is too simplistic to be useful. Antitrust enforcers must examine carefully whether greater competitive harms are threatened given today's market realities. For example, enforcers might consider whether the scale of the data collected has increased by several magnitudes; the type of data collected; and what it means when companies collect usage data, which cannot be easily replicated, in addition to user data. Most notably, enforcers must confront the reality that data insights in the digital economy are combined across the ecosystem of the internet sometimes in ways that transcend product improvement and impact consumer choice altogether.

Today's business methods and practices regarding data appear to be a departure from the kind and scale of old. Thus, it is not particularly compelling to compare today's data-intensive business practices to a brick-and-mortar store's loyalty program.

These changes raise questions about whether there is more potential for abuse of market power than in the past. Scholars have argued that the quantity of data collected and the great strides made in data science can now be used to create a real-time "feedback loop" that was previously unattainable. Some of the data that paves the way for that "feedback loop" can allow for product improvements. A feedback loop that protects market power in one or more markets and leverages usage data in particular, however, may make it more difficult for entrants to compete against incumbents. The perceived importance of controlling data has even led some to suggest that "in markets where zero-prices are observed, market power is better measured by shares of control over data than shares of sales or any other traditional measures."

The Antitrust Division is studying the ways market power can manifest in industries where data plays a key role. It bears emphasizing that good competition policy always has required attention to the specific details of a business practice or transaction. Pablo Picasso instructed that one should "have an idea of what [one is] going to do, but it should be a vague idea." Although that philosophy thrives in the Cubist painting movement, it is a poor guide for antitrust enforcers. We know that antitrust concerns are nothing if not fact-laden inquiries.

Amassing a large quantity of data is not necessarily anticompetitive. The more complicated question for enforcers is how data is collected, analyzed, and used, and, most importantly, whether these practices harm competition. Data can offer important clues about market structure and competitive dynamics.

Some theorize that data can provide incumbents a way to erect barriers to entry or to enhance market dominance. Under this view, a new entrant often cannot compete successfully with an incumbent because it lacks access to the same volume and type of data. The new entrant firm thus may exit the market while the incumbent firm grows lethargically, without the same incentives that it would have in a competitive market to innovate or otherwise improve the quality of its products. In such cases, prospective new entrants and their venture capital backers may be deterred from entering the market altogether.

Others respond by emphasizing that data is ubiquitous, inexpensive, and non-rivalrous, an economic label indicating that data can be collected simultaneously by several firms. In their view, it is easy for new entrants to amass valuable data and compete. In addition, the investment in the collection of large volumes of data is what spurs innovation and many procompetitive product improvements, such as more relevant product recommendations or "free" content, in the first place.

I do not plan to endorse either view today but instead I will make two observations.

First, we should be wary of arguments that oversimplify how bargaining, transaction costs, and competition principles apply with respect to businesses that rely on data collection, aggregation, and analysis. As I described during a recent discussion in Aspen, there may be important qualitative differences between business practices that rely on user data rather than usage data. To ignore as much misses important clues about the ways that the volume, nature, and derivative uses of data animate business decisions across a variety of digital markets.

Second, the acquisition of data as opposed to dollars may create new analytical challenges. As I mentioned in remarks this February, "[i]n the absence of price competition, market definition can be difficult. The traditional analytical test applied by enforcers to define relevant markets … does not translate directly to a zero-price market. We cannot look at the effects of a five percent increase in price because five percent of zero is still zero."

Yet, antitrust enforcers may need to play an even greater role in zero-price markets, "where the absence of price to the end consumers could make private damages recovery difficult, or where effects on business partners, such as advertisers who must rely on an ongoing relationship, may impede the incentives for private antitrust actions." For this reason, the Division is especially vigilant about the potential for anticompetitive effects when a company cuts off a profitable relationship supplying business partners with key data, code, or other technological inputs in ways that are contrary to the company's economic interests.

As a foundational matter, we must acknowledge that data has economic value and some observers have said it is analogous to a new currency. It is not valueless simply because the market-bearing price of a resulting product or service is zero. Indeed, the tools of economics have much to say about the efficient allocation of data. For example, firms can induce users to give up data by offer-ing privacy protections and other measures to increase consumer confidence in the bargain. Just as antitrust enforcers care about companies charging higher prices or degrading quality as a sign of allocative inefficiency, it may be important to examine circumstances where companies acquire or extract more data from consumers in exchange for less.

The bargain implicit in some of today's digital transactions reminds me of a cartoon I recently saw in The New Yorker magazine. Two friends are seated at a table. One shows the other his phone screen and explains: "It's this new app – you put in your social security number and it makes you look like a cat."

Although the comic may be glib, it offers a sobering insight. A consumer may not have to surrender such valuable data – or so much data – in exchange for the product or service. We don't have a role to say if consumers should or shouldn't knowingly trade their information for a photo of themselves as cats. We can, however, assess market conditions that enable dominant companies to degrade consumer bargaining power over their data.

The collection of data can also reach beyond its commercial value and raise normative concerns about privacy. These issues often enliven discussions about digital marketplaces and competition therein. Professor Shoshanna Zuboff at Harvard Business School has termed the commercialization of predicting human behavior and the accompanying encroachment on privacy as a form of "surveillance capitalism," or "the unilateral claiming of private human experience as free raw material for translation into behavioral data." She has described "private human experience as the final virgin wood," that is now viewed as part of this "new process for production."

Although privacy fits primarily within the realm of consumer protection law, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis.

Indeed, we take note of evidence that some consumers appear to hold revealed preference for privacy. A Pew Research Center survey indicates that more than 85 percent of internet users have taken steps to mask their digital footprints online, by means such as clearing cookies or masking IP addresses. That survey is over five years old. Pew also published an article stating that more than 90 percent of Americans now believe they have lost control over how personal information is collected and used.

It remains to be seen whether consumer behavior in the digital marketplace maps perfectly onto expressed preferences for privacy. Although some consumers care about privacy, they often still relinquish data for a fairly small incentive. Researchers call this the "privacy paradox." For example, 60 percent of consumers say they would be uncomfortable sharing their contact list if asked, as many consider contact information the second-most private piece of data, below only social security numbers. Yet researchers found that a sample of around 1500 students at MIT were willing to share the contact information of their closest friends in exchange for only a pizza – though, admittedly, pizza may be a highly prized good in a presumptive market for very bright college students.

The goal of antitrust law is to ensure that firms compete through superior pricing, innovation, or quality. Price is therefore only one dimension of competition, and non-price factors like innovation and quality are especially important in zero-price markets.

Like other features that make a service appealing to a particular consumer, privacy is an important dimension of quality. For example, robust competition can spur companies to offer more or better privacy protections. Without competition, a dominant firm can more easily reduce quality – such as by decreasing privacy protections – without losing a significant number of users.

As I have said before, these non-price dimensions of competition deserve our attention and renewed focus in the digital marketplace.

I'd like to wrap up my remarks this morning by acknowledging the challenges of antitrust enforcement in digital markets, especially data-driven ones. These issues are not easy, which might be why seemingly every antitrust gathering, symposium, and conference of the last several years has focused on digital markets.

Recent concerns about the power of high-tech firms have led some to wonder whether the antitrust laws are up to the task of detecting and challenging anticompetitive conduct and transactions. Some have suggested changing the antitrust laws, creating new agencies, or even regulating the conduct of certain firms.

While the Division is always willing to engage with Congress on legislative proposals, it bears repeating that our existing framework is flexible enough to detect and to address harms in old industries and emerging ones alike. We have a long history of enforcement against titans of industry, including Standard Oil, AT&T, and Microsoft. We also have filed lawsuits to stop anticompetitive transactions in digital markets, such as the one proposed by Bazaarvoice and PowerReviews.

When I think about proposals to amend the antitrust laws I am reminded that such calls are hardly new. Over 80 years ago, law enforcers confronted similar calls to change the law. Back then, as now, the public expressed concerns about economic concentration. Even government leaders sought a new antitrust framework in order to advance certain social or political ends. This was the subject of a piece titled "Should The Antitrust Laws Be

Revised?". It was penned in 1937 by Robert Jackson, a former Assistant Attorney General of the Antitrust Division, Attorney General of the United States, and Justice of the Supreme Court. In it, Jackson recounted a few concerns from his day. For example: "[c]oncentration of corporate ownership of wealth, chiefly means of production, has proceeded to a surprising degree." Just in case that doesn't sound familiar, here is Jackson again reciting the popular concerns of his day:

"[B]ig business has destroyed its own defense, has devoured its own young. The small business man who used to be our most ardent capitalist and the most uncompromising of conservatives has been crushed, or merged, or consolidated, or otherwise retired. This has brought about a subtle change, not only in economic life, but in social and political life as well. There are values in local independence and responsibility which are being sacrificed to balance sheet values."

These worries, eloquently stated in 1937, mirror modern complaints about the economy. Nevertheless, and despite the vociferous calls of his time, Justice Jackson believed that competition, not government regulation, ought to be the rule of trade.

Competition in a free market is the cornerstone of the U.S. economy. When it comes to the digital marketplace, a bedrock principle of U.S. antitrust policy remains as applicable as ever: free markets, not governments, should decide winners and losers.

It is thus the Division's priority to promote free markets and the ethos of innovation through timely and effective antitrust enforcement. This goal does not fluctuate with the industry at issue. After all, competitive markets, along with sound antitrust policy buoyed by the rule of law, enabled the United States to become the "cradle of innovation" in the first place.

As we think about antitrust enforcement in data-intensive sectors, it is impossible to ignore the reality that firms collecting consumer data seek to sell predictions about future consumer behavior by examining past and present consumer decisions. As enforcers, we too, examine past and present decisions by consumers and businesses alike. More importantly, we are engaged in making informed predictions about future competition based on present risks and challenges.

Fortunately, we don't have to go it alone. We are privileged to have longtime experts on the intersection of antitrust law in digital markets in our Technology & Financial Services Section and our San Francisco office, among other Division lawyers across the country. We benefit from the insights of our in-house PhD economists, diligent paralegals, and dedicated support staff.

In addition, we anxiously await the arrival of a dozen recently hired, experienced lateral attorneys who will assist our enforcement efforts.

In addition, I am pleased to announce that the Division is establishing a two-year trial attorney program with emphasis on assisting the Division's reviews in this sector. We intend to bring an additional five talented thought-leaders and litigators into the Division. Application information will be posted on the Antitrust Division's website soon.

To conclude, no firm, agency, or person is clairvoyant, but as we better understand the factors that bear on business conduct and transactions in data-intensive sectors, antitrust enforcers can better detect violations that threaten anticompetitive effects. It is incumbent upon antitrust enforcers not to be too myopic or formalistic when it comes to anticompetitive conduct in the digital age. As famed mathematician and theoretical physicist Henri Poincaré said, "It is far better to foresee even without certainty than not to foresee at all."

Thank you.

Panel 4

FTC HEARINGS & OTHER ONGOING CONSULTATIONS

Speakers:
Philip MARSDEN (Professor of Law and Economics, College of Europe; Deputy Chair of Enforcement Decision Making Committee, Bank of England), Reiko AOKI (Commissioner, JFTC), Henri PIFFAUT (Vice President, Autorité de la Concurrence), Geoffrey A. MANNE (Founder & Executive Director, International Center for Law & Economics), Derek W. MOORE, (Attorney Advisor, Policy Planning Office, US FTC).

Moderator:
D. Daniel SOKOL, Professor of Law, Levin College of Law, University of Florida.

How do you deal, institutionally, with populist concerns relating to privacy, technology and inequality?

Philip Marsden stated that it is important not to ignore such concerns, but instead to channel them into coherent, economically literate theories of harm and articulate them in court. Remedies need to be tailored to the case at issue. Larger concerns are ignored at the peril of authorities, but the climate should not affect the weather.

Reiko Aoki noted that these concerns have been articulated in Japan, where the JFTC responded through studies on the digital economy, including via a study on the trading environment on digital platforms.

Henri Piffaut underlined that there is always a risk of competition authorities existing in an ivory tower and commended the FTC for holding its hearings. In their own ways, European competition authorities have also created spaces for debate.

Geoffrey Manne noted that the problem is that some of the people doing the debating are the wrong people. As a result, the debate is quite often dominated by political economy or philosophy discussions beyond the role of antitrust rules.

Derek Moore also noted that there are good reasons for the FTC to listen to these concerns, even if they are not strictly speaking competition concerns. The FTC held numerous hearings recently, eliciting contributions from various parties. The goal was to listen to the public and take its concerns seriously.

There have been a number of reports and hearings suggesting new directions for competition policy. What are the institutional limitations in existing systems that require new solutions? What will change on the ground?

Reiko Aoki noted that a concern that might be particular to Japan is that it already has a unit in the cabinet office that cuts across the various government departments in order to address issues in the digital economy. The first output is a new act aimed at improving transparency of practices on digital platforms. There is a long tradition of the JFTC collaborating with ministries that oversee specific industries. This unit is a good way to address these issues quickly.

Philip Marsden noted the UK Furman Report, which addresses these issues. The CMA underlined that competition rules should stay in their lane, but proposed an alternative track for certain cases. In many cases, the decision making takes too long, particularly in the review process, due to the need to defend cases in court. There is a need to streamline processes. The alternative track involves procompetitive ex ante regulation. There are two examples of this working in past cases. The first relates to brick-and-mortar retail markets, where there were bad business practices in the supply chain, which were dealt with through a specialized desk. This is analogous to the current concerns relating to online platforms. The second relates to banking markets, where there was no specific antitrust injury, but there were specific issues relating to data portability, which were dealt with through specific rules mandating open APIs and data portability.

Henri Piffaut recognized that the digital economy raises certain issues, but they need to be specifically identified and there is also a need to determine whether they are in fact competition questions, or if they should be dealt with through other policy tools. Regulators need to build the right knowledge and experience to deal with these problems, both through consultation with the public and having the internal staff and resources. They also need the necessary legal tools to address the problems. For example, in France, there can be no ex officio interim measures, but this may need to change in light of the digital economy. Regulators also need to deal with the question of risk aversion, i.e. not taking cases if there is a risk of losing. Some agencies are reluctant to take cases, while others are "imperialist" in that they address non-antitrust issues using antitrust tools. Finally, there is the risk of fragmentation within the EU, where there are multiple authorities applying the same rules in different ways. There needs to be coordination.

"The digital economy raises certain issues, but they need to be specifically identified and there is also a need to determine whether they are in fact competition questions."

Geoffrey Manne stated that commentators do not focus enough on the Herculean efforts that staff undertake to deal with these issues, such as through hearings, particularly where there is no outcome in terms of cases won.

Derek Moore underlined the important difference between the FTC hearings and what was done in the UK or in the EU. The FTC has not employed an outside expert to make proposals. The FTC and its staff are inherently more limited than an outside expert. The question of the desirability of an additional regulatory body for large tech platforms is outside the scope of the FTC's expertise and mandate. Some of the other reports make suggestions or recommendations for competition agencies to consider. The FTC is aware of these recommendations and is taking them into account. The FTC has established the technology taskforce, which is a permanent enforcement division of the agency, and may lead to enforcement action. The FTC is also working on a platform guidance document, which is designed to provide guidance to the business community and the antitrust bar on the FTC's views on enforcement in this domain. The FTC is also considering updating the competitor collaboration guidelines and its approach to the state action doctrine.

Geoffrey Manne noted that data is only part of the picture – competitive outcomes also depend on what platforms do with the data. Similarly, there was a lot of material produced in the FTC hearings, and he said he would be surprised if any of it was actually new. Fundamentally, the CMA was likely presented with similar information. The real institutional limitation is knowing what to do with this information, particularly when regulators are under pressure to do something concrete. One possible output is ex ante regulation, but this may be the wrong thing to do. These processes are all geared towards "doing something," and this may be regrettable.

Philip Marsden argued that one of the strawmen used against ex ante regulation is that there would be a new bureaucracy. But the idea is to create a small, agile unit with stakeholder participation. The Furman Report was intended to stir up debate worldwide, which is why it does not focus on specific UK institutional issues. A "regulatory winter" is coming. Unless it is pre-empted, there may be damaging regulation coming, that could adopt extreme rules, e.g. banning online streaming. Concerning retail banking, the UK authorities, despite strong pressure, did not break up the banks, but adopted more sensible measures.

How do we define the scope of "tech platform" regulation? What industries are within its scope? Is it a broad concept, or are only specific sectors at issue?

Derek Moore noted that the FTC is actively considering this question and will shortly have an output.

Geoffrey Manne underlined that this debate is emblematic of the myopic focus on product markets. Perhaps regulators should look more broadly at the way firms are organized, and why, specifically with relation to innovation and R&D. This is not done nearly enough. The label of "tech" or "platform" is misleading.

Henri Piffaut stated that the important thing is to have the economic tools in place to understand new developments.

Reiko Aoki noted that the JFTC enforcement unit has a well-defined scope – two-sided platforms that operate over the internet. It is important to note that in Japan the consumer protection unit is entirely separate from the antitrust authority. But individuals are traders on online platforms, and as such the competition laws also apply to them, including rules against abuses of superior bargaining positions by large platform companies. Consumers are owners of a very valuable product, i.e. information.

Philip Marsden noted that the CMA is focusing on companies with a "strategic" market position, which is a lower threshold than dominance, and that these companies would be the ones subject to any code of conduct the CMA develops. The CMA is not focusing on ill intent to develop theories of harm. It believes that the problems derive from the engineers, who are amoral rather than immoral agents in this process. The tech giants are analogous with babies – they occasionally need to bathe, whether they want to or not.

What if the bathwater is toxic? Are you worried about non-competition concerns, e.g. industrial policy, polluting antitrust analysis?

Geoffrey Manne took the view that this is a good metaphor. The real problem is the lack of information and theoretical certainty of any sort concerning the harms that allegedly need to be fixed. There are a lot of assumptions concerning the harmful nature of the practices being discussed. But regulators don't know with any certainty whether there is any real harm. Implementing outcomes based on supposition invites other interests to interfere. This has the potential to undermine the original intentions.

Henri Piffaut stated that he is not concerned by outside policies influencing antitrust. Antitrust decisions are subject to review by courts, which apply the law. Antitrust by definition is not predictable – otherwise there would be no cases. The key is to ensure precision in decision making, and to ensure that cases are well-reasoned and based on solid facts and evidence. There is also a risk of solving questions that are not really antitrust problems using antitrust tools.

Reiko Aoki underlined that competition policy has a sound economic theory behind it, and it should stick to that with confidence. Regulators need to make clear the limits of competition policy and have other policies in place to deal with other issues.

Derek Moore emphasized the importance of coherence in the doctrine. There are many classic cases that have clear outcomes but are not clear on the purposes of antitrust, such as Brown Shoe, which recognized that certain practices are not harmful to consumers, but still underlines the need to protect small businesses. There are concerns with integrating non consumer welfare concerns to the antitrust rules, because then the outcome of cases will be unclear.

Philip Marsden regretted that antitrust is always playing catchup. The Furman Report, like others, found evidence that there are in fact economic harms occurring. The horse has bolted. Inaction is not an option. Similarly, all the reports are out. 2019 was the year of reports, and 2020 will be the year of actions, in the form of legislation, enforcement, and guidelines. It is better to steer the policy rather than abstain from the process. It is better to try to do something rather than allow these markets to stultify.

> *"Data is only part of the picture – competitive outcomes also depend on what platforms do with the data."*

AUDIENCE QUESTIONS

Could you comment on the JFTC Report's observations that self-preferencing could be a violation in Japan?

Reiko Aoki noted that the JFTC is interested in abuses of superior bargaining position, and foreclosure of either online platforms or retailers. For now, the Report is merely just that – a Report, and it is unclear whether there will be any cases brought on this basis. The JFTC hopes that players will adapt their practices to avoid problems.

Should the immunities granted by the 1996 Communications Decency Act ("CDA") be adapted for ISPs?

Derek Moore agreed that it is sometimes necessary to revisit rules. Section 230 of the CDA may need to be revisited. That said, most of the arguments to change it are likely bad ideas. This is part of an ongoing political fight concerning the visibility of certain political views. There is a strong basis to look at the consequences of the law, but no need to immediately reform it along any given line.

Panel 5

FORMER ENFORCERS' ROUNDTABLE

Speakers:
Allan FELS AO (Professor of Law, University of Melbourne), A. Douglas MELAMED (Professor of the Practice of Law, Stanford Law School), Bill BAER (Partner, Arnold & Porter), Maureen K. OHLHAUSEN (Partner, Baker Botts).

Moderator:
Jon LEIBOWITZ, Partner, Davis Polk.

On the consumer welfare standard, for almost 40 years it has been at the core of a broad consensus on antitrust but recently it has come under attack. What are your thoughts on its ongoing validity?

Maureen Ohlhausen opened by noting that this debate has several strands. The first concerns whether it only relates to price and the clear answer is no. The other aspect of the debate is whether antitrust does things other than protect the competitive process. But why should antitrust enforcers be the ones to turn the dials on other regulator concerns? On one level this is a question of democracy – as antitrust enforcers are not elected.

Bill Baer added that the other questions (privacy, labor, etc.) are legitimate, but agreed that antitrust enforcers are not equipped to deal with it. Antitrust enforcers are perhaps too focused on price, and there are legitimate means for antitrust to take a broader look at parameters of competition.

Douglas Melamed regretted the misunderstanding of the consumer welfare standard. The attacks on consumer welfare are often wrong. There is nothing in the case history to show that antitrust enforcement has not focused on innovation, entry, and other effects. The real question is whether antitrust should look at broader economic concerns. It should not. It is asking antitrust enforcers to

“ The real question is whether antitrust should look at broader economic concerns. It should not. It is a recipe for regulatory capture and it is ultimately the powerful that will benefit. ”

balance economic welfare against other issues. There is no objective metric to do this. It is a recipe for regulatory capture and it is ultimately the powerful that will benefit.

Allan Fels doubted that any antitrust enforcer in the world genuinely applies the pure consumer standard. In addition, the consumer welfare standard applied be enforcers is not the same as the one used in economic textbooks. Say there is a merger that gives rise to a monopoly, which can price discriminate. This produces a surplus in standard textbook economics, but would never be allowed under antitrust rules.

There is another standard that could be used, based on transaction cost economics. If you look at the concept of hold-up, nearly always the victim has heavy sunk costs that allow it to be taken advantage of. This may be a better way of summarizing what the enforcers are in fact doing.

As to Australia, there has long been a public interest test in merger enforcement. In other words, antitrust harm can be balanced against public interests. In practice, it is better to allow the competition authorities to do this than have politicians or another body do it. Instances where the public interest prevails have been rare in practice. This should not be left to politicians because the reasons cited are almost always weak.

Douglas Melamed stated that allowing this ambiguity would be an odd fit in the US, as there are also 200 million individuals and 52 government agencies which are capable of enforcing the antitrust laws.

Some in the Democratic party have called for modifications to the consumer welfare standard and amendment of the Clayton Act. Do you think this is advisable?

Bill Baer regretted the overemphasis on avoiding false positives. There has been a downplaying of the interpretation of the term “tending” in the interpretation of the wording of the Clayton Act by courts, which may have reduced its effectiveness. As to other possible reforms: burden shifting may be appropriate for transactions of a certain size. Also, parties may be required to facilitate ex post reviews of mergers. In short, some of those changes may be advisable, particularly if the courts remain as cautious as they have been.

Maureen Ohlhausen agreed that some of the changes may be sensible, but the proposals are based on assumptions that increasing concentration has resulted in consumer harm. This merits more analysis and does not appear to be true in all sectors, e.g. grocery. We also need to look at what antitrust can already do, e.g. looking at nascent competitor cases. Those cases can be hard to win, but they can be done where the evidence and the facts are present. Finally, some of the cases pointed to justify changes do not involve any reduction in competition. All that said, there is some merit to the proposals.

Allan Fels wondered if the US enforcers have sufficient powers to do market studies. For example, such powers were called for in the Australian Digital Markets report. In addition, the major failure of competition policy everywhere has been a failure of advocacy. This is because the agencies are not sufficiently powerful politically. Something should be done about the advocacy problem, everywhere, for example requiring reports on potentially anticompetitive laws.

There is global scrutiny of platforms. Why is this and is it justified?

Douglas Melamed took the view that the scrutiny is justified, but it is not clear that the laws should be changed. The reasons for scrutiny are clear: the platforms are powerful and this power has implications for privacy and speech, among other things. In the history of antitrust there is often overenforcement with respect to communications providers, e.g., movie studios were prohibited from owning theaters, and there was much enforcement against cable providers. This may provide some context for why this is happening to internet giants now.

Do any of you agree that platforms should be “broken up”?

Bill Baer did not agree, but noted that in the antitrust “silo,” commentators often do not pay sufficient attention to the other problems that tech companies create. The Furman report and others are more holistic, and we need to have a candid debate about the need for more regulation that could be procompetitive. For example, the 2003 FTC Decision on phone number portability unlocked competition in mobile and stimulated competition. If, for example, we were to conclude that privacy and other considerations are sufficient to justify user

“ The major failure of competition policy everywhere has been a failure of advocacy. This is because the agencies are not sufficiently powerful politically. Something should be done about the advocacy problem, everywhere ”

ownership of data or to require it to be deleted, this may also unlock competition. This would need to be thoughtful – but there may be problems that require regulatory solutions.

Maureen Ohlhausen emphasized that the FTC, for example, also enforces other rules, like privacy. All that said, there may be a need for the federal government to adopt a more uniform privacy law. In addition, the notion of interoperability potentially goes against user privacy, because data sharing may be forced. There is a risk of conflict and clashes here. For example, should one social network be allowed to scrape user data off another without user consent?

Douglas Melamed stated that it is hard to imagine any antitrust theory that would justify a major divestiture remedy. But what about no fault intervention? It is hard to identify criteria to establish whether this is warranted. Even then, it may not be justified even on the basis of some kind of balancing test.

Recent reports in the UK, EU, Australia, and elsewhere suggest that sectoral regulation is required for digital platforms. Why do you think this is the case? Are antitrust laws not up to the challenge?

Douglas Melamed noted that the platforms are big, powerful, and seemingly not controllable. And the possible antitrust violations they are accused of would not solve the underlying problem of entry barriers.

Allan Fels recommended adopting a divestiture power, but would not impose legislative breakups. Breakups should only occur where harm and a breach of the law has been proven in court. He also mentioned that there is debate on whether banks should be broken up, whether audit firms should be prohibited from doing consulting, etc. But these are not competition issues, they are more conflict of interest issues. On data rights, for example, concerning banks, consumers can require banks to give consumers all data, and allow consumers to share that information with other banks. The ACCC report states that the ACCC should engage in some litigation following the report. The report also made some recommendations on privacy, but concluded it should be sent to a privacy regulator. The report also concluded that certain unfair practices should be prohibited in new legislation. The ACCC report will be evaluated by the government shortly and it is expected that most of the recommendations will be adopted.

Bill Baer took the view that the correct way to look at this question is to examine what problems can be dealt with under antitrust rules, and which may require other solutions. This will result in antitrust not being stretched too far, but could resolve these other legitimate social and economic problems.

> *“There is a significant degree of overlap in the agencies' powers, particularly in terms of civil litigation. The agencies must work that out, and that doesn't seem to be working out right now. It is hard right now for the agencies to collaborate the way they should, particularly given”*

Why aren't regulators pushing platforms to design themselves in a way that would render its problematic activities impossible?

Maureen Ohlhausen took the view that enforcement in fact does that already. One challenge is that regulators are asked why they didn't do certain things, and the answer is that there are opportunity costs which renders it necessary to prioritize certain cases. Given the resources, tools and territories of the different regulators, they appear to be doing this to the extent possible.

Turning to collaboration between US antitrust agencies, we understand that this moves in cycles, but it appears to be in a downcycle at the moment. Do you think there's a problem between the FTC and the DOJ at the moment?

Bill Baer agreed that relations are currently under strain and there is a significant degree of overlap in the agencies' powers, particularly in terms of civil litigation. The agencies must work that out, and that doesn't seem to be working out right now. It is hard right now for the agencies to collaborate the way they should, particularly given their limited resources. This encourages State AGs to take up the mantle themselves, which raises other problems. Further, it is hard for the US to adopt an international leadership role where the agencies are in conflict.

Douglas Melamed noted that there is also a lot of spread between the Democrats and Republicans in the agencies at the moment. In addition, the Attorney General and the President do not appear to have much respect for the independent agencies, and this causes further problems.

Jon Leibowitz concluded that in the end, ultimately, people need to respect institutions. Otherwise we run the risk of more conflict, and, for example, FTC Commissioners could end up filing amicus briefs in DOJ actions.

Allan Fels observed that in Australia there is one national regulator and the states have given up their powers to the national regulator. This appears to work well.

AUDIENCE QUESTIONS

How do you define a standard for a consumer dataset across different platforms? E.g. a data footprint on Amazon is not the same as on Google and so on. And how will this change as services evolve?

Bill Baer proposed that there would need to be some kind of statutory enactment to enable the FTC or another agency to adopt regulations. This would need to be a dynamic regulation to prevent negative externalities.

Maureen Ohlhausen noted that some platforms are already experimenting in how to allow interoperability. It may be best to let the experts take the initiative before stepping in as a regulator.

Jon Leibowitz agreed that there will be a need for some experimentation on this question to be resolved, for example as the privacy regulation continues to be developed.

Douglas Melamed took the view that if there is to be regulation, it should be very focused and deal with competition issues narrowly, rather than be a broad-based code of conduct to address all possible issues, which would carry risks in itself.

What of the roles of the ICN or the OECD in building a common international understanding and helping less experienced authorities to catch up?

Bill Baer underlined that there is a role for the US in building this common understanding. This is why the agencies need to collaborate better. The ICN and the OECD could also play a big role in this.

Allan Fels noted that ICN does not have China as a member at present, which is an important omission. The OECD is seen as a rich countries club, but China does participate

Do you think there has been underenforcement in tech in recent years?

Allan Fels agreed that there had been, in the US.
Douglas Melamed agreed also, and that this was the case not only in tech, but generally, this is largely due to the courts being too cautious.

Maureen Ohlhausen took the view that there has been both under and overenforcement in certain areas. Systematically, enforcement should avoid swinging too far in favor of overenforcement if there has been underenforcement..

“Some platforms are already experimenting in how to allow interoperability. It may be best to let the experts take the initiative before stepping in as a regulator.”

Speakers Contributions

Reiko Aoki
JFTC

The objective of the Japanese Antimonopoly Act (AMA) is to "promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers" by promoting "fair and free competition". Sound economic analysis ensures predictability and precision. Economic framework is sufficiently general to accommodate flexible application of AMA as economic and technological environments change.

In response to recent concerns from consumers and businesses, JFTC has conducted several studies such as 2018 "Competition Policy Research Center (CPRC) Report of Study Group on Human Resources and Competition Policy, and 2019 "Report of Survey and Interviews of Digital Retail Platforms and App Stores." Reports identify practices that may be anticompetitive and also present the arguments. Human resources report covers the gig economy where workers are not workers in the labor law sense.

Draft guideline on "Abuse of Superior Bargaining Position Applied to Consumers on Digital Platforms" is an example of flexible application of the AMA to new markets. Consumers trade private information for goods and services on digital platforms. They routinely accept terms of trade presented to them as take-it-or-leave-it offers, which leave very little (or zero in theory) surplus to the consumer. While personalized goods and services increase total welfare, take-it-or-leave it "pricing" leaves very little to the consumer.

Competition policy and regulation have always been complimentary in Japan. The division of responsibility has changed as technology has changed. For instance, JFTC has been consulted regarding energy markets by the Ministry of Economics, Trade and Industry (METI) and wireless markets by Ministry of Internal Affairs and Communication (MIC) in the past. Now JFTC, MIC and METI have jointly established the Digital Market Competition Headquarters in the Cabinet Office, The office is drafting the Act on Improving Transparency of Digital Platformer Transactions covering self-preferencing and other practices.

We should make clear what competition policy is designed to accomplish while being aware of implications on factors outside the competition policy objective such as income distribution or employment. Competition policy is not able to address things like income and employment. There are other policies for then. Often it is pointed out that there is no concept of fairness in economics. Actually there is a whole literature on fairness that defines precisely a different interpretation of fairness. Once the definition of fairness is determined, economic analysis will present a unique conclusion.

Philip Marsden
College of Europe

I love babies, I love running, and I love water...especially tides. What does any of this have to do about competition issues in the digital economy though?

This note is provoked by many visits I've made recently to competition authorities and governments. They want to do something about online harms and competition problems, but don't know what to do, and don't think they have the necessary tools or – frankly – the economic might to make a difference. I thus introduce some thoughts I was honored to debate at the United Nations this summer, in a digital and competition conference of 193 member governments.

Digital giants are often perceived as all powerful, and enormously complex...but this doesn't mean that governments should throw up their hands and say it is "all too difficult" or "what can one country do?" or even "what if we get it wrong, won't the sky fall in?" The tech giants are all relatively young – Facebook is a teenager and Google in its early 20s – but they don't always act like grownups, sad to say. In fact, more often than not they act like giant babies with very simple wants. Indeed, they may seem to be providing us with amazing things, but they also take up a lot of our energy. So, yes, like babies they are life-changing, and wonderful, and they let us see the world through new eyes, and do things we could never have imagined. They give us joy and add real value to our lives. But like children most of these giant tech babies are exhausting, they are demanding, all they want is our attention. Indeed, demanding attention and maximizing engagement is the core business model for many of them – and they take, take...and take. Most of the time the attention they seek is rewarded in development and growth, and we feed them insights and lessons, which they can make their own as they mature.

But we have to remember that they are not the boss of our lives. Their needs and development are not so difficult and demanding that we should cede our authority over them – not even when they do grow up and show that they can be responsible. And most of all, we have to stop being so intimidated by these tech babies, and we must never say "gosh, understanding them and raising them is so difficult, let's just let them grow up on their own." That would be the feral path – and no one wants that, do they?

Yes, we see more and more of the world through their eyes, and work and live online...spend hours rubbing a rectangular piece of glass...but that does not mean that we live in their world. They live in our world, and we have to remember "who's the daddy?," "who's the mummy?" Who is? We are. The giant babies are in our house, and they have to live by our rules – they don't get all of our attention, they don't get fed whenever they want – and they don't get whatever they think is best, not for them, and they definitely do not get to say what is best for us.

Life is messy, and more often than not, babies need a bath. As they grow into kids and teenagers, even more so sometimes. They need a good wash sometimes, and particularly so until they can clean themselves, or have the incentive to keep themselves relatively hygienic. Right now, it seems to me that the giant tech babies are getting into a serious mess. If they haven't understood the need to keep themselves clean, then until they do, sadly, the grownups need to step in. Obviously, whether human or digital, no one wants to throw the baby out with the bathwater. But that often-used phrase is not an excuse for never getting them to clean up their act.

Of course, we need to preserve tech giants' innovation incentives, and of course our remedial wash must go with the grain of technological developments. These days we clean with soap, after all, not sand – and we shouldn't add grit or friction to these fast-moving markets. But it is our bath, it is our house, it is our rules, and we determine when they're clean enough to go to school or just out to play again.

So, are our rules adequate? This takes me to the second love I mentioned: running. I think of proper competition in terms of a race. A true competitive constraint is like the loud footsteps and hot breath of the runner just behind you. In many of the digital markets there aren't many other runners, and even if there are, they are either way behind the leader, or are busy running a different race entirely, though it may take place on the same track. Just as a 10,000-meter runner is no constraint on a sprinter, so too is the world's fastest 100-meter star no constraint on the marathoner. As such, it is back on mom and dad again to run after the kids and make sure they play safe. We have to ask whether we enforcers are running quickly after these giant lumbering babies, especially those who say that their operating ethos is to "move fast and break things" – and so often then do break important things like data security, invading our privacy, and hurting businesses, consumers and citizens. Are we fast enough to catch and stop these giants? Of course we aren't.

Yes, many of the practices of the big tech firms are analogue models in digital clothes – old wine in new bottles – and we've seen them before and know what to expect. We know about exclusionary tactics and exploitation of power imbalances – we've seen kids shutting other playmates down, freezing others out, or outright bullying, so we know what to expect. Our legal framework, broadly speaking, is adequate and it can evolve to handle new harms. But whether we know what to expect, or are just being vigilant for the future, we have to be close enough to matter. More often than not, enforcers are too far behind the action. And when we have to bring the courts with us to tackle new harms, we cannot wait for the glacial evolution of judicial precedent, we have to lead the charge.

When people tell me that enforcers can never catch up and that tech markets are too fast for us to comprehend, they sometimes argue that we should do nothing, for fear of scaring the horses. But that's rubbish – these markets are not that difficult to grasp. We know what the ad-funded tech babies want – our attention. We know they take our data and they change it into interesting new things that provoke more engagement and data release from us, and they make money off that. In the process, sometimes they are greedy and starve others, and sometimes they get leaky. So, follow the data, follow the money, are good overall policies, but when we start to hear complaints of actual harm, we need to act fast or cake-grabs or lunch-money-thefts by the bullies can lead to starvation and worse. If we see this stuff on the playing field, we have to blow the whistle fast – use interim measures and call a time-out. The sky won't fall in, it really won't. And we need to get faster at detecting and acting on such harms for two reasons. One, it's the right thing to do, and if we don't, we are not fulfilling our responsibilities as enforcers. But second, if we don't act, then with the rising tide of populist revolt against the tech giants, some other regulator will step in, and they won't care a jot for baby's welfare. The regulatory bath they draw will be cold, it will be full of grit and will chill any growth or innovation.

Finally, speaking of water, I mentioned I like tides. A tide is coming in. It is indeed a cold tide and it is aimed at regulating online harms in digital markets. No swimmer should ever try to fight a tide – we can't hold it back, that's for sure.

But we can channel it, and we can use its tidal momentum, its force, and use it to drive regulatory innovations.

I've said we want to help clean up the worst practices of the digital babies, not throw them out with the bath water, and make them work harder, and face a genuine race, so they work harder for consumers and users, even if it means they have to sweat a bit more than they'd like. In our report of the Digital Competition Expert Panel – Unlocking Digital Competition – in March 2019 we proposed improvements to competition law – to help enforcers run faster. But we also proposed a complementary layer of pro-competitive regulation because, first, it is the right thing to do, and second, because it is needed to handle the features of digital markets that create the opportunities for problems but which are not themselves issues for competition law: so network effects, economies of scale and scope, the transformational use of data, tippy markets, entrenched dominance and consumer and user inertia and dependence on the big platforms. This dependence means we have a duty as enforcers to ensure that platforms' great power is balanced with a great responsibility – to act appropriately. So, we proposed a code of conduct for companies with strategic market status, to help clean up these markets of the most toxic exclusionary and exploitative practices. This would make the tech giants behave better, ensure a more competitive and fair ecosystem, create opportunities for innovators and consumers, and take the pressure off competition agencies or governments to Just Do Something ill-thought-out. So, we are proposing to "ride the tide" of the momentum for strong digital regulation, but aim it at the worst practices.

So, to conclude: like good parents we clean the baby, we teach it right from wrong, we ensure it has what it needs (not just want it wants) we teach it to run and compete fairly, and we ensure that its environment is safe for it, and all participants, whether incumbents, entrants or consumers. If we have to ride a tide of tech regulation to make that happen, then so be it. We're the Daddy, and don't you forget it.

CPI Talks With...

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CPI Interviews

Professor Christopher S. Yoo

Professor of Law, Communication, and Computer & Information Science, Penn Law

November 8, 2019

CPI's Editor in Chief Sam Sadden has interviewed Professor of Law, Communication, and Computer & Information Science, Penn Law, Christopher Yoo.

CPI: CPI has the pleasure to sit down today with Christopher Yoo, who is the John H. Chestnut Professor of Law, Communication, and Computer and Information Science and Director of the Center for Technology, Innovation and Competition at the University of Pennsylvania.

Professor Yoo will speak at the upcoming second annual conference at Harvard Law School on Friday, November 8, "Challenges to Antitrust in a Changing Economy." We look forward to his panel and his thoughts on the panel entitled "Competition in Digital Advertising: Is There Online and Offline Convergence?" The conference is co-organized by CPI and CCIA, and registration is free. Thank you, Professor Yoo, for taking the time to speak with CPI today.

So, what are some of the major issues related to competition in digital advertising? And please go a bit into your work focusing on whether advertisers regard different forms of advertising as substitutes.

Christopher Yoo: A lot of the questions around digital advertising are really motivated by the growth of the importance of digital venues as avenues for advertising as the subsequent drop in traditional venues. It's raised serious questions about whether in fact traditional advertising and digital online advertising act as substitutes.

1 The full interview can be listened to at: https://soundcloud.com/user-698490989/cpi-audio-interview-with-christopher-yoo

Part of this has been informed by my own personal experience. One aspect of my background is before I became a law professor and before I went to law school, I went to business school and worked in the advertising department for Procter and Gamble, a major global advertiser. And one of the experiences I saw there is that we used all the channels, and in fact adjusted the mix of the different aspects of advertising to correct for any strengths or weaknesses in particular markets. That gives me a very intuitive sense that in fact for most products, what advertisers care most about is sales and they don't really care how they get them, they just want to get them in the most cost-efficient manner.

It's also backed up by a growing body of empirical literature that is studying whether, for example, online and offline advertising substitute for one another. It's very early in the day and everyone will tell you that if you're evaluating scholarship, you're supposed to believe a literature, not an individual paper, but as of now we have about five or six papers that have been published in the peer-review literature and they all pretty much uniformly show that online and offline advertising do serve as substitutes for one another. That will change how regulators view these markets, defining them to be within the same market or not, and it should, in fact, inform how we think about how different actors can exert market power and potentially harm competition in this space.

CPI: In the title of the panel that you'll be on, it discusses the idea that there is some online and offline convergence within advertising? So within the idea of them being substitutable, that's leaning towards the idea or the answer that yes, there is some convergence within these two different types of advertising?

Christopher Yoo: Absolutely. Again, those studies are the beginnings of the emergence of literature and were done by careful social scientists who made disclaimers about how much to generalize off one study, but they do generally show that as a uniform finding that they do serve as substitutes for one another. This does raise a different question though, which is one of the biggest issues for me is the importance that competition policy be enforced in a data-driven empirically-based manner. If you don't insist on the discipline of having verifiable facts, people can proffer their favourite theories or argue in favour of a particular business model or the interest of a particular actor. And in that sense, what I worry about is sometimes the discourse, particularly in the digital advertising world, has been more about optics than about empirics, and that has the hallmarks of making bad policy.

And particularly, it's a tough question in the early days of the growth of empirical literature about how much evidence do you need, and if the literature is not yet conclusive, which way does that cut? I think the more studies we get showing that they are substitutes make it harder to regard the issue as open, and it starts to trend towards putting the burden of proof on those who are trying to show that they're not substitutes.

CPI: And I think that ties in nicely with the last question. If you have any thoughts or predictions on competition policy inquiries into digital advertising, such as the CMA in the UK and the Spanish competition authority?

Christopher Yoo: It all depends on how seriously they take their obligation to be data-driven. They pointed to the literature showing that they are substitutes, but said, "Well, that doesn't conclusively show that they are substitutes."

On the other hand, they don't really show or point to any evidence showing that they're not substitutes, and in fact, I'm not aware of any studies that say they're not. And so at that point, they're trying to use a burden of proof argument to say, "Oh, the people who are trying to say they are substitutes haven't shown that definitively, therefore we go the other way." Usually, competition enforcement authorities bear the burden of proof of showing that a competition violation has occurred before proceeding with an enforcement action. If they stick to the legal obligation, then the ambiguity would cut against those trying to enforce it because they would bear the burden to show that they are not substitutes, as opposed to forcing the respondents from bearing the burden to show that they are substitutes. That said, I think that judicial enforcement and judicial review usually stands as a backdrop to many of these decisions and actually will usually hold enforcement officials to proper competition policy principles.

CPI: Well I think there'll be a topic to keep an eye on, for sure. So, thank you once again, Professor Yoo, for sitting down with CPI for this interview, and we look forward to seeing you on Friday, November 8th, at Harvard Law School for the upcoming second annual conference "Challenges to Antitrust in a Changing Economy," co-organized by CPI and CCIA. We hope to see many of our listeners and readers there. Thanks a lot.

Professor Daniel Sokol

Professor of Law, Levin College of Law, University of Florida

November 8, 2019

CPI has interviewed Professor of Law, Levin College of Law, University of Florida, Daniel Sokol.

CPI: What are some of the big takeaways, in your opinion, from the recently held FTC Hearings on Competition and Consumer Protection in the 21st Century? And do you have a sense of what the FTC will produce as result of these hearing and a timeline for that?

SOKOL: The hearings have allowed people from different backgrounds a platform to express their ideas. Some of these ideas are very much outside of the mainstream. What is important to note is that despite all of the FTC hearings and comments submitted, the signal from the FTC has been to make clear that economic analysis (for which people use "consumer welfare" as shorthand) is not being overturned and the FTC remains an enforcer and will not transform to being a price or non-price regulator. The FTC has not come close to overturning the presumption that we keep economic analysis as the sole criterion for competition analysis.

I know that the FTC is working hard on a nuanced report that synthesizes the learning on many of topics. Such a report takes time to put together. In the meantime, some additional speeches by agency leadership to reassure the business community that the FTC is a strong enforcer that believes in an evidence-based approach would be helpful, particularly in foreign jurisdictions, where there is some confusion as to what the FTC really believes.

CPI: What do you see to be some of the other major "consultations" or "studies" taking place in other jurisdictions internationally related to the digital economy?

SOKOL: There are many studies under way or recently concluded. It sometimes seems that there are more authorities with studies than without. Some of the most important such studies are in the US, UK, Japan, Australia, Canada, the European Commission, among many. Some studies are politically motivated by forces outside of competition authorities. Regardless of where the motivation of such studies originates, the important thing is for competition authorities to work through the complex issues in digital platforms. First, they need to explain the technology. Then, they need to understand how technological changes impact the business economics of a particular industry or set of industries. Then, they need to establish the legal issues. Some reports have policy recommendations untethered from the understanding of technology and economics. Reports that jump to conclusions not based on a good understanding of the technology and economics, delegitimize such authorities in the global community as nothing other than political pawns responding to broader populist impulses rather than serious and nuanced enforcers.

CPI: How do you see competition authorities coming towards best practices or some sort of convergence on issues related to the digital economy in the coming years? Or do you think there will be more divergence?

SOKOL: Divergence is a real problem, particularly on single-firm conduct. The basis of such divergence is the lack of robust economic effects-based analysis in a number of jurisdictions. The lack of such analysis also creates a series of due process problems since some authorities mask their incomplete or uneven economic analysis with poor procedural fairness – a lack of transparency and due process because they want to prevent being second-guessed or criticized. Better procedural fairness means that authorities win or lose cases on the facts and economic analysis. There is room for improvement globally.

> *"Some studies are politically motivated by forces outside of Competition Authorities. Regardless of where the motivation for such studies originates, the important thing is for competition authorities to work through the complex issues in digital platforms."*

Gallery


D. Daniel SOKOL
University of Florida


2nd Annual

Visit https://www.competitionpolicyinternational.com/harvard-conference-2019/ to see more photos and videos from the conference.

Complianceweek.com

DOJ: Big Tech's data collection creates 'avenues for abuse'

Aly McDevitt
Nov 12, 2019

Assistant Attorney General Makan Delrahim, chief of the Justice Department's Antitrust Division, warned tech titans that the government is investigating the nexus between consumer data collection and market power and will pursue them for anticompetitive behavior derived therefrom. The antitrust enforcer broached this and other words of warning during his keynote address at the "Challenges to Antitrust in a Changing Economy" conference held at Harvard Law School on Nov. 8.

Delrahim compared consumers' private information to "oil" for the digital age, calling the "collection, aggregation, and commercial use of consumer data … analogous to a new currency."

While Delrahim did not call out any companies by name, the DOJ official emphasized misuse of user data by Big Tech companies can threaten to harm consumers just as much as corporate competitors. "It would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis," he said.

On the consumer side, Delrahim cited Harvard Business School Professor Emerita Shoshana Zuboff's theory on "surveillance capitalism," which argues big data and the field of commercial surveillance has resulted in a widespread assault on individual privacy. Behavioral targeting, relentless tracking, and social media addiction, among other things, are methods of this assault.

While Delrahim stated collecting data is not in and of itself anti-competitive, what is done with that data might very well be.

On the corporate competitor side, Delrahim argued tech giants' unmatched reserves of user data enable them to leverage their position against smaller rivals, namely by "cut[ting] off a profitable relationship supplying business partners with key data, code, or other technological inputs in ways that are contrary to the company's economic interests," Delrahim said. In other words, Big Tech companies hold the unique ability to force business partners out of business simply by barring access to user data at will.

This level of power threatens competition in the marketplace, which in turn threatens consumer privacy more dearly in a vicious cycle.

"Without competition, a dominant firm can more easily reduce quality—such as by decreasing privacy protections—without losing a significant number of users," he said.

Reuters

Existing U.S. antitrust laws can address tech monopolies, DOJ antitrust chief says

Nandita Bose
Nov 8, 2019

The U.S. Justice Department antitrust chief said on Friday that existent U.S. antitrust laws are "flexible enough" to address harm caused by technology companies, in the face of growing criticism that such laws cannot tackle tech monopolies.

Makan Delrahim spoke at an antitrust conference at Harvard Law School hosted by the Computer & Communications Industry Association, which counts companies like Amazon , Facebook and Alphabet's Google as members.

"Some have suggested changing the antitrust laws, creating new agencies or even regulating the conduct of some firms … it bears repeating that our existent framework is flexible enough to detect harm in any industry and emerging ones," Delrahim said.

The Department of Justice and the Federal Trade Commission have come under pressure from lawmakers, who have accused them of wasting time arguing who would investigate which tech company, amid a broad investigation into firms like Google, Amazon, Facebook and Apple.

Delrahim also warned tech companies that collecting vast troves of consumer data could create competition concerns in the eyes of regulators. He did not name any company specifically.

His comments on data and privacy mirrored concerns from European antitrust regulators , who have penalized tech companies for using consumer data in anti-competitive ways.

"Although privacy fits primarily within the realm of consumer protection law, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis," Delrahim said.

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Washington Post

DOJ issues new warning to big tech: Data and privacy could be competition concerns

Tony Romm
Nov 8, 2019

The Justice Department's top antitrust enforcer warned tech giants Friday that amassing vast quantities of consumers' data could create competition concerns in the eyes of federal regulators, marking the U.S. government's latest shot across the bow at Silicon Valley.

Makan Delrahim, the chief of the department's antitrust division, told a conference hosted by a tech lobbying group that the Justice Department is "studying the ways market power can manifest in industries where data plays a key role." He stressed people's private information had become the lucrative "oil" for the digital age — and its misuse could threaten to harm consumers and corporate competitors.

While Delrahim did not mention any specific company by name, the comments could have vast implications at a moment when the agency is investigating tech giants including Google.

"Although privacy fits primarily within the realm of consumer protection law, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis," Delrahim said.

Later, he added, "Without competition, a dominant firm can more easily reduce quality — such as by decreasing privacy protections — without losing a significant number of users."

Justice Department announces broad review of big tech

Delrahim's speech could bear special significance for tech giants including Amazon, Facebook and Google, which are confronting competition-focused investigations in Washington for their business practices. Such warnings are a familiar refrain in Europe, where antitrust regulators have probed and penalized tech giants for wielding their massive stores of data in anti-competitive ways. (Amazon CEO Jeff Bezos owns The Washington Post.)

With Amazon, a key concern is the e-commerce giant's collection of sales data from third-party merchants and whether the tech giant is able to leverage that unique position against smaller rivals. In Facebook's case, the fear is that no competitor could ever launch a viable social network of their own because they could never match Facebook's stores of data — a serious threat to users, experts say, given the company's pockmarked record on privacy.

And for Google, advocates for aggressive antitrust action against the tech industry take issue with its unparalleled view into its users' lives from the wide array of services it provides — from its search engine to its Android smartphone operating system. Federal regulators are likely to confront this issue directly in the coming months, following Google's announcement that it would acquire FitBit, a wearables company, for $2.1 billion. The purchase, if approved, could grant the tech giant access to even more information — this time, about device-owners' health and wellness.

Texas attorney general, Google's new competition cop, says everything is 'on the table'

Without commenting on those or other companies, Delrahim said collecting data is not by itself anti-competitive — rather, it is about what is done with that data. He delivered that message in front of an antitrust conference at Harvard Law School hosted by the Computer & Communications Industry Association, which counts Amazon, Facebook and Google as members.

"Amassing a large quantity of data is not necessarily anticompetitive," he said. "The more complicated question for enforcers is how data is collected, analyzed and used, and, most importantly, whether these practices harm competition."

Delrahim said the Justice Department is "especially vigilant" when a company "cuts off a profitable relationship supplying business partners with key data, code, or other technological inputs in ways that are contrary to the company's economic interests."

And the Justice Department antitrust chief also stressed the agency is mindful about the effects on users as well: "Just as antitrust enforcers care about companies charging higher prices or degrading quality as a sign of allocative inefficiency, it may be important to examine circumstances where companies acquire or extract more data from consumers in exchange for less."

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Associated Press

Top Antitrust Enforcer Warns Big Tech Over Data Collection

Frank Bajak
Nov 8, 2019

The Justice Department's top antitrust official warned Big Tech companies Friday that the government could pursue them for anticompetitive behavior related to their troves of user data, including for cutting off data access to competitors.

"Antitrust enforcers cannot turn a blind eye to the serious competition questions that digital markets have raised," Assistant Attorney General Makan Delrahim told an antitrust conference at Harvard Law School.

Delrahim did not name any specific companies, but his office is investigating companies including Google while the Federal Trade Commission probes Facebook. The House Judiciary Committee is also conducting an inquiry looks at those two companies plus Amazon and Apple.

All but Apple are members of the Computer and Communications Industry Association , a tech lobbying group sponsoring Friday's conference.

Delrahim said some of the most interesting and alarming legal issues raised by the rise of the digital economy are in the "collection, aggregation and commercial use of consumer data," which he called "analogous to a new currency."

He said his office is studying "the ways market power can manifest in industries where data plays a key role," particularly when large amounts of data are amassed that are "quite personal and unique in nature" and offers insight into "the most intimate aspects of human choice and behavior, including personal health, emotional well-being, civic engagement and financial fitness.

That, said Delrahim, can create "avenues for abuse."

The acquisition of such data is especially valuable for companies in the business of selling predictions about human behavior, he said. That's how Google and Facebook — which dominate global search and social media — attract targeted advertising.

He cited Harvard Business School professor emerita Shoshana Zuboff's theory of "surveillance capitalism," which holds that the "behavioral data" those companies acquire through their nominally free services is a wholly new kind of product. Zuboff considers it massively invasive and exploitative.

Delrahim said that "although privacy fits primarily within the realm of consumer protection law, it would be a grave mistake to believe that privacy concerns can never play a role in antitrust analysis."

He cited several studies indicating people's willingness to "relinquish data for a fairly small incentive" including a study in which 1,500 students at the Massachusetts Institute of Technology "were willing to share the contact information of their closest friends in exchange for only a pizza."

Robust competition can spur companies to offer more and better privacy protections, Delrahim said.

"Without competition, a dominant firm can more easily reduce quality - such as by decreasing privacy protections - without losing a significant number of users," he said.

That has been a major criticism of both Facebook and Google.

Delrahim also said his office is being "especially vigilant about the potential for anticompetitive effects when a company cuts off a profitable relationship supplying business partners with key data, code, or other technological inputs in ways that are contrary to the company's economic interests."

A lawsuit filed in California against Facebook by a small startup called Six4Three claims it forced thousands of partners out of business by cutting off their access to valuable user data in 2015 while continuing to provide it to preferred partners that generated big advertising revenues. Facebook says it restricted access out of concern for user privacy.

One company not cut off until later, the political consultancy Cambridge Analytica, obtained the personal data on 87 million people without their knowledge or consent. That revelation triggered intense scrutiny of Facebook and other Big Tech giants, including investigations by most state attorneys general of both Google and Facebook.

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Reorg.com

FIT/GOOGL: Fitbit 'Knowledge' of Interest to Google; State Reviews Possible

Ryan Lynch
Nov 11, 2019

Google may pursue pro-consumer uses of Fitbit such as motivating people to exercise, said Hal Varian, Google's chief economist. For instance, a Google-owned Fitbit could "wake you up slowly to do your yoga," Varian said. "That would be great."

William Kovacic, a former chairman of the FTC, raised the question of whether states are in a stronger position and more inclined to intervene in transactions such as Fitbit/Google as a result of state-based investigations into big tech companies, namely Google and Facebook.

A Facebook spokesperson commented that Google and Facebook do not control the advertising market. Alternatives include Microsoft, Amazon, podcasts and smart TVs, the spokesperson said.

Concerns about advertising markets should not affect Fitbit/Google, said Christopher Yoo, professor of law, communication, and computer and information science at Penn Law. "We have the advertisers we have," Yoo said. "If we block it, we'll have the same number of advertisers as before."

Although Google is making the case that its Fitbit acquisition goes beyond the further aggregation of consumer data, U.S. antitrust enforcers at the federal and potentially state levels are likely to examine that issue closely.

Hal Varian, Google's chief economist, told Reorg M&A that the transaction was motivated not just by data, but also by Fitbit's knowledge and experience in wearable technology. "They also have lots of knowledge that we don't have," Varian said, after praising Fitbit for having a solid user base and a good product.

The combination of Google and Fitbit could be helpful to consumers, Varian added. For example, Fitbit may know when people exercise, which Google could leverage to motivate users. Theoretically, "it will wake you up slowly to do your yoga," Varian said. "That would be great."

Varian also said that Google has tried to compete in the wearables sector - a potential area of interest for antitrust regulators.

"You've seen the question that is asked: Why don't you do it yourselves? Why aren't you doing it on your own?" said William Kovacic, a former chairman of the FTC.

The overall regulatory environment - which includes not only state and federal antitrust investigations of Google, but also the targeting of U.S. tech firms by presidential candidates - creates a dynamic where there is "so much pressure now to scrutinize a big tech buyer" of another technology company, Kovacic said.

Further, state regulators "feel quite emboldened to do much more," as exemplified by the Sprint/T-Mobile transaction, he noted. Kovacic raised the question of whether states are in a stronger position and more inclined to intervene in transactions such as Fitbit/Google as a result of state-based investigations into big tech companies, namely Google and Facebook.

In response, a Facebook spokesperson said the risk from state antitrust enforcers has obviously not reached a level that prevents tech acquisitions from happening. As a caveat, the spokesperson noted that at Facebook at least, the corporate development team does not necessarily brief the policy team on planned acquisitions.

Still, Fitbit/Google does not fit the Sprint/T-Mobile mold, the Facebook spokesperson said. For example, it would be difficult for a state regulator to determine how many Fitbit users are within that state, according to the spokesperson.

With respect to pending antitrust investigations, the same spokesperson argued in support of a broad advertising market that includes not only Facebook and Google, but also Microsoft, Amazon, podcasts and smart TVs. Companies that want to acquire consumer information have other alternatives such as working with third-party data brokers, the spokesperson added.

An industry participant expressed skepticism toward this broad view of ad markets, commenting that tech companies may specialize in different types of ads. For example, Amazon competes primarily as an online retailer of products, so that company is less likely to attract ads for service-oriented businesses, the participant said.

Christopher Yoo, professor of law, communication, and computer and information science at Penn Law, said he does not think that concerns about market concentration in online advertising should affect Fitbit/Google.

"Whether you allow Google to acquire Fitbit isn't going to change the number of those alternatives at all," said Yoo. "We have the advertisers we have. If we block it, we'll have the same number of advertisers as before. That issue is irrelevant."

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Reorg.com

WCG/CNC: New Jersey Approval Expected by Mid-December

Ryan Lynch
Nov 15, 2019

The New Jersey Department of Banking and Insurance held a hearing last week to consider the WellCare-Centene transaction, according to a department spokesperson.

The department has a deadline of approximately Dec. 19 to issue a decision, the spokesperson said.

Centene and WellCare also need approval from Illinois and the DOJ. In response to Reorg M&A's questions, DOJ antitrust chief Makan Delrahim told reporters last week that the agency would continue to expedite its merger reviews and would not delay merger decisions because of pending state-level reviews.

New Jersey's Department of Banking and Insurance held a hearing last week to consider Centene's acquisition of WellCare, according to a department spokesperson.

The regulatory department, which had not previously responded to Reorg M&A's requests for comment, has a statutory deadline of approximately Dec. 19 to issue a decision about the transaction, the spokesperson said.

"The department conducts a deliberative review of all merger and acquisition filings to ensure that the proposed transaction meets the requirements of the law, and that in all cases the residents of the state of New Jersey are protected," the spokesperson said. There were no public comments during the state's hearing, according to the spokesperson.

The only other outstanding regulatory approvals for Centene and WellCare are the state of Illinois and the DOJ. Insurance regulators in Illinois have said their merger review process is confidential until finalized.

In response to questions from Reorg M&A, DOJ antitrust chief Makan Delrahim told reporters at a Harvard Law School conference last week that the agency would continue to expedite its merger reviews and would not delay merger decisions because of pending state-level reviews. The DOJ will issue merger decisions when it is ready to do so, Delrahim said.

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Reiko Aoki

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