

BIG TECH AND ANTITRUST – CALLING BIG TECH TO ACCOUNT UNDER U.S. LAW
for the House of Representatives Judiciary Committee, Antitrust Subcommittee

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I. Introduction

We are pleased to respond to your request for our views on how to call Big Tech to account under the US antitrust laws.

Antitrust has become a matter of public concern in a way that we have not seen since we began to study, practice, and write about antitrust law; indeed, that has not been seen in the United States for more than a century. Many antitrust scholars have been critical of developments in antitrust law for quite some time, of course, but it is the rise of Big Tech that has brought antitrust to the fore. Reasonable people ask how it is that the antitrust laws have done little to curb what many see as the excesses of the Big Tech firms that dominate our economy and lives, and the fundamental challenge that this dominance poses to the control of economic power in a democracy.

Our major conclusions are these:

- Congress needs to reinsert itself into antitrust. The democratic values at the heart of antitrust law can best be articulated by legislative action, not through the courts.
- Because the day-to-day application of antitrust law is inevitably a common law enterprise, we urge the adoption of legislation that will give better direction to how the courts should adjudicate antitrust disputes.
- One method for articulating that direction is the legislative adoption of a National Competition Policy. This Policy would not only guide courts but also the Federal Trade Commission's interpretation of Section 5 of the Federal Trade Commission Act.
- Antitrust law cannot solve every problem that Big Tech raises. In addition to antitrust reform, it may be necessary to adopt a more regulatory approach, such as we have chosen for the restructuring of electric utilities or the control of systemically important financial institutions.
- We should not expect instant solutions, but that is not necessarily cause for despair. Technology does not move as fast as we sometimes think.

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In these comments we will identify what we see as the existing and potential antitrust problems, summarize the available tools under the US antitrust laws, consider how well the problems can be solved with existing tools, and – since we believe that the problems cannot be well solved with existing tools -- suggest reform.

II. Big tech and the antitrust problems

The giant big tech companies are commonly identified as Google, Apple, Facebook and Amazon (GAFA), or GAFA plus Microsoft or Netflix (GAFAM or FAANG). We shall call the big tech firms GAFA, a term we use descriptively and not as a closed set for the huge platforms that gather massive amounts of personal data and that enjoy large network effects in winner-take-most markets, keeping barriers to entry high. The GAFA often compete with smaller firms on their platforms, on which they are gatekeepers. They often charge consumers zero for use of the platform, or so it appears to the user, but the platforms then extract large amounts of data that they sell to advertisers, who pay high prices for the valuable curated advertising space. Depending on how markets are defined, some of the GAFA have shares of about 90% (social media, search). Others have significantly lower shares (Amazon) but nonetheless have significant bargaining power and leverage over platform users. In the consumer-facing markets, the prices appear low to very low.

The full economic impact of these firms is suggested by some macro-statistics. Together, the five largest tech giants combined had just over \$800 billion of revenues in 2018. If they were countries, they would be among the world's 20 largest in terms of GDP. By early 2020 each of the five had a market cap of \$1 trillion or more, making up 17% of the S&P 500's total market value.¹ In 2006, the five largest firms in the U.S. were Exxon Mobil, General Electric, Microsoft, Citigroup, and Bank of America. By 2017 GAFA had replaced four of the five. Only Microsoft remains,² and it is the M of GAFAM.

Stakeholders have identified a number of abuses. These include:

1. The gatekeeper problem: The GAFA are akin to essential facilities for many smaller businesses. Many businesses, to do business, must use the platform. They have almost no choice. The GAFA compete with the businesses on their platforms. They demote (Google Shopping; self-preferencing) and sabotage (Facebook Vine) rivals on their platforms when the rivals get too competitive, and they hold up business users for exploitative terms, Mafia-style (give us more of your revenues or we'll disappear the "buy button"). Apple charges Spotify and others a 30% fee just to be carried in its app store. Given their unprecedented access to data of

¹ See <https://www.visualcapitalist.com/how-tech-giants-make-billions/>;
<https://www.cnbc.com/2020/01/31/apple-amazon-microsoft-and-alphabet-and-the-road-to-1-trillion.html>.

² See NY Times, April 22, 2017.

their rivals including what ideas rivals users love, the GAFAs are uniquely positioned to appropriate their rivals' best ideas (Amazon, Facebook/SnapChat, Google).

2. Mergers and acquisitions. The GAFAs snap up threatening start-ups before they can become challenging competitors. Facebook used software that it acquired (Onavo) to do the job. To the outsider it might look as though each "tiny" acquisition was a pig in a poke; how could anyone know that the start-up, left on its own or in other hands, would become a formidable competitor? But the GAFAs knew – because of the data they amassed. Some of these hundreds of acquisitions the GAFAs let die. Others (WhatsApp, Instagram) they cultivated as complements and part of their data trove.

3. Use of unique monopsony and monopoly power and leverage: The GAFAs exploit users by taking their data without telling the users what they are giving up. They take more data than they need to complete the transactions with the users. They even collect users' data from third parties outside of the network (see German case against Facebook). Responding to the public outcry, some of the GAFAs are now asking users' consent in advance; but this is a Trojan horse. You have to click "consent" to be able to use the network at all.

4. Coerced contracts. The GAFAs force tie-ins—you have to load my search if you want to use my operating system (Google/Android). You have to agree to exclusivity. Terms include non-portability, and technical details include non-interoperability.

The above list pinpoints harms that do or might come within traditional antitrust, although some of the conduct lies at the outer boundaries of current antitrust doctrine and require creative arguments not likely to survive Supreme Court review. There may also be a holistic perspective that looks to more general harms, including abuses of data protection, privacy, and consumer protection. We will want to ask: Of that larger picture, what part might be solved by antitrust? Are there synergies, or could we better understand and resolve trade-offs (e.g. data protection versus data access) that would not be apparent by keeping each discipline in its separate silo?

There is also a way to articulate harms that does not start with the limits of antitrust but is told from a non-technical perspective. Harms might then include: We as citizens, as people, are subject to whims and exploitations of these giant corporations that are manipulating our behavior and preferences, taking our data, and exploiting us in all ways they choose for their commercial gain. They are threatening our autonomy and our country's democracy. Their bigness and pervasiveness is or ought to be an antitrust problem, for if Big Tech were not pervasive and we had choices, it would not have power. This claim proceeds: The GAFAs are getting and using the power to exploit all stakeholders - consumers, users, rivals, suppliers (including users as data givers), workers, and citizens who value their privacy and autonomy. Big Tech is highly concentrated and concentration produces not only exploitation and exclusion but also inequality. We need a holistic plan to call it to account.

III. What antitrust tools are available to solve the problems?

The antitrust statutes are the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits anticompetitive agreements. It can invalidate anticompetitive contracts, including exclusive dealing and non-portability clauses when adjudged to be anticompetitive. Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. It can prohibit strategies to wound rivals, and is available to do so if the platform has monopoly power and would get more monopoly power, or maintain its monopoly power, as a result. It can prohibit any course of conduct by a monopoly firm that maintains or increases market power by exclusionary anticompetitive acts (at least without increasing efficiencies and inventiveness). Unlike most of the rest of the world, the U.S. monopolization offense has not been interpreted to prohibit excessive pricing or other exploitative acts.

Section 7 of the Clayton Act prohibits anticompetitive mergers and acquisitions. It prohibits mergers that significantly threaten to increase market power, hurting and not helping consumers.

Section 5 of the Federal Trade Commission, which is enforceable only by the FTC, prohibits “unfair methods of competition.” Enforcement of “unfair methods of competition” has generally been limited to “anticompetitive” conduct, and the FTC tracks what is illegal under the Sherman Act.

After finding that conduct or mergers are illegal, the courts can prohibit them. If injured private parties sue and prove that they suffer antitrust injury from the illegality, they can recover treble their damages. After finding that conduct is monopolistic, a court can consider remedies more severe than an injunction. It can consider structural relief (break-up) if, for example, the structure itself is anticompetitive and has produced significant anticompetitive conduct, or the course of anticompetitive conduct cannot be remedied with injunctive relief alone. But, despite a handful of early breakups, modern courts are not sympathetic to this remedy. As the Court of Appeals in Microsoft said, “the precise form that relief should take . . . should be tailored to fit the wrong creating the occasion for the remedy.”³

Similarly, the Federal Trade Commission can prohibit anticompetitive conduct, enjoin illegal mergers, and order divestitures. The FTC has rule-making power, which should include the power to make antitrust rules. Antitrust rules could, for example, require dominant gatekeepers to apply a rule of neutrality in operating their platforms.⁴

We return to the possibility of breakup by the courts in Sherman Act cases. Is there such a thing as a monopoly offense based solely on the structure or size of the firm and not on specific anticompetitive conduct? Is a breakup available for a structural violation? It can be

³ United States v. Microsoft Corp., 253 F. 3d 34, 107 (D.C. Cir. 2001).

⁴ See 15 U.S.C. §§ 46(g), 57a(a)(2). If the FTC does not now have this power, Congress should grant it.

argued that there should be a structural monopoly violation. Consider the case of Ma Bell (the AT&T case) in the 1970s, where the structure of the company was clearly anticompetitive. But the case was not about structure alone. Predictably AT&T took a series of egregious anticompetitive actions and strategies. Moreover, the AT&T breakup was by consent; it was not adjudicated by a court. We think it is unlikely for U.S. federal courts today to declare a structural monopoly violation, much less a bigness violation, and much less a remedy of breakup for a structural monopoly or bigness violation. If a plaintiff were to go to court to break up big tech simply because it is too big, the complaint would almost surely be dismissed. That is why the rhetoric – “break them up; just use antitrust” – seems more rhetorical than a practical prescription of a solution available under existing law. To be viable in court, the complaint would have to allege monopoly power in a defined market and anticompetitive conduct increasing or entrenching the monopoly power, or acts en route to and likely to achieve that power. Even if the legal theory were proved, there would be no guarantee of breakup. If a violation is adjudicated, a breakup order could be a possibility, but it is neither automatic nor common. Moreover, if the market is dynamic and has changed during the years of trial preparation and trial, breakup may be beyond reach.

IV Are the Antitrust Tools Sufficient to Address the Antitrust Problems?

A. The limits of the tools – the monopolization violations

The antitrust law is conservative. Section 2 of the Sherman Act is the statute most relevant to the abusive conduct of the big platforms. For example, the claims of gatekeeper self-preferencing, of demoting rivals, of cutting off data when a rival gets too competitive, of stealing the rival’s best ideas, of exploiting users by taking too much data without adequate disclosure – would all naturally be decided under Section 2. But plaintiffs, including federal and state agencies, would face big problems in trying to win such cases. First, the plaintiff would have to define the market and consider the share of the big platform in the market, and it would need to show a monopoly or near monopoly share. While it might seem obvious that Google has more than 80% of search and Facebook has more than 80% percent of social media, given the antitrust technicalities, computing the high percentages is not so easy. Google and Facebook famously list “good alternatives” for users every time they are asked by the media or Congress. Moreover, they argue that the market is two-sided; that advertising revenues must be included. But even if search and social media markets are proved and the 80%+ shares are shown, the plaintiff will not have an easy case in proving monopoly power. The usual economic models do not fit zero-priced markets. The platforms will invoke their zero prices to claim that they (the platforms) are good for consumers, and they will argue, with considerable support, that low prices for consumers and innovation are the only goals of antitrust law.

But the key point we want to make on the conservative tilt of the U.S. antitrust laws remains even if we bypass all of these problems and assume that Google and Facebook each has more than 80% of its market and that each has monopoly power (an exercise, incidentally,

much more difficult regarding Amazon, with its much lower market shares and persistently low prices, and Apple, which faces competition from Android-based devices). The Supreme Court case law applying Section 2 of the Sherman Act seems to assume that almost everything a dominant firm does is efficient and procompetitive, if it acts alone and not in conspiracy with competitors.⁵ A dominant firm has no duty to deal except under very narrow circumstances. Also, under U.S. antitrust law, except in very narrow circumstances, there is no such thing as an essential facility with a duty to deal fairly.⁶ The platforms have a strong claim that they invented the platforms, can use them as they like, and do not have duties to help their rivals. The court of appeals' decision in *United States v. Microsoft*⁷ examines those assumptions more closely, based on a fully-developed trial record, but that case was decided before the Supreme Court case of *Trinko*.⁸

Yet another element of Section 2 would make a Section 2 case against the platforms very challenging. That is: To find a violation, courts usually require proof that the putative bad acts of the monopolist increase or entrench the market power of the monopolist, and this is usually measured by the power of the monopolist after and as a result of the conduct to increase price and lower output. Yet the power of the platforms, which depends so heavily on data and its aggregation, seems to defy the traditional price/output paradigm. The effect of the conduct can sometimes be articulated in these terms, but that is a challenge. Litigants will need to focus the court on other types of harm, particularly harm to innovation by non-dominant firms. Still, courts are not likely to be receptive to arguments that would protect small firms from the deprivations of large successful ones.

The platforms argue that their conduct is not anticompetitive. It is competition. At worst it is just unfair competition, and the Sherman Act does not touch what is labeled as unfair competition.

Since Section 2 of the Sherman Act is such a difficult tool to use, we look elsewhere; namely, to Section 5 of the Federal Trade Commission Act. As we noted, the FTC Act is applied as if the FTC were enforcing the Sherman Act. The FTC imports Sherman Act standards. By that perspective we get no boost from the FTC Act. But no law binds the FTC to the standards of the Sherman Act. With will, the FTC can hold that the FTC Act prohibits all anticompetitive conduct; that the Sherman Act falls short of doing so; and that the FTC Act fills the slack.⁹ The

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

⁶ *Id.*

⁷ *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

⁸ Microsoft can be distinguished from *Trinko* on the facts, but the deep principles of *Trinko* are not in tune with antitrust duties to deal. European Union law is not only sympathetic with *United States v. Microsoft* but is even more sympathetic with duties to deal. See Eleanor M. Fox, Testimony before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Trends in International Antitrust Enforcement, June 29, 2017, <https://www.congress.gov/115/meeting/house/105986/witnesses/HHRG-115-JU05-Wstate-FoxE-20170629.pdf>.

⁹ See Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, June 24, 2019,

FTC can also do rulemaking, as we suggest in point VII; it can declare that certain conduct – which is both anticompetitive and unfair – is illegal.

We recognize that there are also other sources of law. The states of the United States are a source of law, but state standards will not eclipse federal standards. The European Union is an aggressive enforcer, and several cases are in the appellate pipeline. Other jurisdictions are also enforcing their competition laws against the big platforms.

b. The limits of the tools – the merger violations

In merger cases, the courts can prohibit anticompetitive acquisitions. There are problems raised by the Big Tech acquisitions that may complicate the task. First, the Big Tech platforms have developed strategies to acquire all promising start-ups, to keep them from becoming competitors. It is difficult for the enforcers to identify these acquisitions as anticompetitive at the time of acquisition – even though the Big Tech acquirer has identified the firm as a competitive threat and has predicted the effect (insulating itself from important competition). At the other end, when the agencies realize what has happened, Big Tech claims equities in keeping the completed acquisitions. They argue that the acquired start-ups that survived (many have been purposely shut down) could not have gained their stature had they had to go it alone. They argue that certainty and predictability should counsel the agencies to withhold post-merger divestiture. Moreover, they argue that these small firms start up with the hopes of being bought out by the GAFAs; that the prospect of acquisition was their incentive to invest and innovate. The problems are complicated by the fact that the acquired start-ups are usually potential rather than actual competitors, and the law has been weak in attacking mergers of potential competitors. Post-merger divestiture is not common, but it does occur. The agency will have to prove that the acquisition in fact harmed competition and that people, especially consumers, will be better off after the divestiture.

The Sherman Act, too, can in theory be used to prohibit strategies to buy up all of the nascent competitors, to kill some and co-opt and nurture others. From the analysis of the weaknesses in the Sherman Act, above, we are not sanguine that application of the Sherman Act is the answer either.

While not specifically about platforms, the United States has a megamerger problem. Even mergers of leading competitors producing very high concentration are commonly cleared, with risky spinoffs declared likely to replace the lost competition. Examples include the big cement merger, Holcim/Lafarge, and the big telecoms merger, Sprint T-Mobile. The parties and their experts can make any merger to the highest concentration sound procompetitive and innovative. Supreme Court law, *Philadelphia National Bank*,¹⁰ presumes such mergers are anticompetitive and shifts the burden to the merging parties, but the agencies belittle the

https://www.ftc.gov/system/files/documents/public_statements/1531606/p180101_section_5_report_dissenting_statement_by_chopra_and_slaughter_6-27-19.pdf.

¹⁰ 374 U.S. 321 (1963).

presumption as out of step with economics and, while the presumption is usually given at least lip service by the courts, it may be easily rebutted even where the anticompetitive effects are palpable.

B. Summary regarding antitrust tools

The antitrust tools are limited in addressing the antitrust problems. Still, we favor working with the tools we have and sharpening them, as well as legislative proposals we suggest below.

IV. Possible solutions

Our discussion so far has focused on the limitations of current legal doctrine and remedies. These failures will not reverse themselves. Courts and agencies need the direction of Congress.

Legislative change is necessary not only to achieve better antitrust outcomes. Legislative change is necessary to bring unelected courts closer to the democratic values that have animated Congress since the time of the Sherman Act's passage in 1890. Despite subsequent Congressional efforts—the passage of the Clayton and Federal Trade Commission Acts in 1914 and the Cellar-Kefauver amendment to the antimerger law in 1950—antitrust doctrine has become encrusted with technocratic interpretation that has thwarted what Congress tried to achieve. Many citizens and experts are dissatisfied with the current state of affairs; but not the targets of antitrust enforcement, which are able to use the system to delay or block the application of the antitrust laws to their behavior.

There are now a number of pending legislative proposals to amend the antitrust laws. Rather than reviewing or critiquing these proposals, we make some framework suggestions for legislative reform.

First, we urge the legislative adoption of a National Competition Policy. This Policy would reset the framework of what is anticompetitive and should be prohibited. We do not suggest a laundry list of do's and don'ts. Such categorical rule-making would be both over-broad and under-inclusive. It would invite arguments in avoidance of the rules, and could turn antitrust into a tax code. Although a few specific rules could be helpful (see below), antitrust in general needs standard that breathe. A National Competition Policy would offer a chance to renew antitrust; to move it from the narrow laissez faire policy we have to a dynamic policy fit for the era.

A modern statement of policy would reach beyond a narrow price/output paradigm. It would protect of the competition process for the good of the people. It could also re-affirm the

importance of state and private enforcement of the antitrust laws, both of which have been under attack in recent years.

Second, we urge Congress to consider specific legislation that would simplify litigation in a way that would allow courts more easily to achieve the goals of the National Competition Policy. One important way to do that would be to specify evidentiary presumptions that would shift the burden of justification to defendants. Courts in antitrust cases have often used presumptions, but the courts today more often use them to defeat antitrust claims. Congress could, for example, require dominant firms to justify certain exclusionary conduct, or their giant mergers. Congress could also make rules special to certain types of acquisitions; for example, acquisitions of nascent competitors by industry leaders.

Third, we urge Congress to clarify the scope of the FTC's authority to reprehend "unfair methods of competition" under Section 5 of the FTC Act. The Commission's most recent statement of its authority under Section 5 took too narrow a view of how it might go beyond the limits of current Sherman Act interpretations.¹¹ Congress envisioned a broader role for the Commission when it enacted the FTC Act in 1914. Congress should now write a yet clearer delegation of authority that reaffirms the Commission's role in making certain that markets are working properly, without being tethered to the Sherman Act, on the one hand, and without an unbounded delegation of equitable authority on the other.

Fourth, we urge Congress, in the exercise of its oversight authority, to encourage the FTC to engage in antitrust rule-making. Commissioner Chopra has persuasively argued for the use of this approach to flesh out antitrust rules.¹² With the addition of clearer Section 5 authority, the Commission might consider rules that prohibit some of the major abuses we detailed above with regard to Big Tech behavior—for example, self-preferencing, cutting off data life-lines to punish rivals for competing, and coercive bargaining tactics.

Fifth, Congress should seriously consider a complementary regulatory approach to deal with some systemic problems that require ongoing supervision and expertise and are difficult to remedy with after-the-fact litigation. High on this list would be data and privacy concerns. There may also be interoperability concerns that are hard for enforcement agencies to discover and for courts to monitor on an on-going basis. Regulation need not cover every platform company or every practice. Nor should it grant immunity from antitrust rules. Rather, a regulatory approach should be considered a complement to antitrust enforcement, not a substitute, and should be market advancing. Indeed, as we discovered in the electric power

¹¹ See Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the Federal Trade Commission Act, 80 Fed. Reg. 57056 (Sept. 21, 2015).

¹² See Comment of Federal Trade Commissioner Rohit Chopra, Sept. 6, 2018, https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf.

industry, informed industry regulators may be better placed to restructure what looks like a monopoly industry in a way that improves efficiency and better serves the public interest.

Sixth, we urge some patience and longer-run thinking. We tend to view technology-based industries as constantly evolving, and there is some truth to that. But these Big Tech platforms are relatively stable in their business models and even their technology. Facebook has defined what a social network is; Google has controlled search for most of this century; Apple's technology evolves but it introduced its iPhone more than a decade ago. The proof of the stability story is Microsoft itself. Although Microsoft no longer dominates the browser market (Google Chrome does), the browser remains the key software program for navigating the worldwide web, just as it was when Microsoft was sued over the "browser wars" more than two decades ago. Basic technology doesn't necessarily change so fast.

Seventh, the international challenge. The problems we have canvassed are international problems. The EU and China are developing their own plans on how to control Big Tech as well as how to compete through big tech. The EU is far ahead of the U.S. in enforcement (against American firms) and is developing a Europe-cohesive plan. How can we expect to solve these problems as a U.S. problem? How to address these issues as a national and an international problem is a national imperative.

VII. Conclusions

Twenty-five years after the publication of the Antitrust Paradox, Robert Bork penned a new introduction to his book. Noting that the introduction to his original book "concluded on a note of Teutonic gloom" that antitrust was beyond repair, he looked back at the developments since the book's publication "with mingled satisfaction and chagrin." Satisfaction that antitrust had moved so fully in his direction; chagrin that his "pessimism [had] resulted from a serious underestimation of the power of ideas" ¹³

We could look at the state of antitrust today with Teutonic gloom. But we do not. We believe that ideas, plus the political will and the right political moment, can move mountains. The ideas we sketch above are both embedded in antitrust tradition and reflect the problems that the Big Tech firms present today. Political leadership can lead to change, particularly, as we suggest, change in antitrust's enforcement framework and clarity in its policy framework, all with the ultimate goal of restoring the vitality of antitrust and the primacy of the competition process to work for the people.

¹³ See Robert H. Bork, *The Antitrust Paradox* ix-x (1993).