Antitrust Chronicle

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U.S. HOUSE REPORT ON DIGITAL MARKETS

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The U.S. House Judiciary Committee's Report on Digital Markets represents a landmark in the latest round of efforts to subject the "big tech" companies to antitrust scrutiny.

The Report, clocking in at over 400 pages, and published after a thorough set of hearings, sets out detailed concerns primarily with respect to the conduct of Google, Apple, Facebook, and Amazon, all of whom are alleged to operate dominant "platform" businesses. Significantly, the report was also issued in the context of various investigations by Federal, state, and international agencies into these companies' conduct. Its political salience can therefore scarcely be underestimated.

On a technical level, the stated aim of the Report is to examine whether such dominant firms are engaging in anticompetitive conduct, and whether existing antitrust laws are adequate to address any such issues. The pieces in this Chronicle set out to evaluate the Report in light of these stated aims, and to assess its likely outcomes. As these pieces make clear, the jury is still out on the Report's content and its likely implementation.

What appears clear, however, as the timely articles in this Chronicle illustrate, is that there are winds of change in the air. Regardless of how the conclusions in the Report are implemented, the climate has become frostier for the large platform operators, and there will inevitably be practical changes in how such companies adapt their conduct to the renewed vigor in antitrust enforcement that this Report represents.

As always, thank you to our great panel of authors.

Sincerely,

CPI Team[1]

1 CPI thanks CCIA for their sponsorship of this issue of the Antitrust Chronicle. Sponsoring an issue of the Chronicle entails the suggestion of a specific topic or theme for discussion in a given publication. CPI determines whether the suggestion merits a dedicated conversation, as is the case with the current issue of the Chronicle. As always, CPI takes steps to ensure that the viewpoints relevant to a balanced debate are invited to participate and that the quality of our content maintains our high standards.

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By Edith Ramirez, Chuck Loughlin & Logan Breed

As antitrust issues in the tech industry have become an increasing topic of discussion — and litigation — a more fundamental question has also become central: is current antitrust law sufficient to adequately preserve competition in the digital sector? The Democratic leadership of the House of Representatives antitrust subcommittee believes not. In a lengthy report summarizing the committee's extensive investigation into the effects of market power online, committee leaders provide an ambitious legislative plan intended to increase competition in the digital markets. The majority's proposals are likely to be subject to vigorous debate in Congress during the next term, with lawmakers deciding whether the current antitrust laws have proved insufficient to foster robust competition in this increasingly important sector of the U.S. economy. This article looks at the ambitious proposals in the House Report and the likelihood of bipartisan consensus regarding the appropriate level of oversight of digital markets.

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A lively debate about the effectiveness of current antitrust laws and enforcement capabilities has erupted in the U.S., focused in particular on the competitiveness of what has been labelled "digital markets." This article focuses on two of the most recent contributions to that debate, the fruits of hearings held by the U.S. House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, which propose potentially significant reforms. The two reports join an ongoing and global discussion of the institutional and doctrinal adequacy of competition law to adapt to new technology-driven business models and the information economy. This article summarizes the legislative recommendations of the two reports, evaluates areas of agreement and disagreement among the two reports, considers public reaction to the recommendations, and evaluates the likelihood of the legislative proposals becoming law.

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By Abbott Lipsky, Jr.

The majority staff of the House Judiciary Committee recently released its Report and Recommendations ("MSRR") following an investigation of competition in digital markets. It claims that the leading digital technology firms (Alphabet, Amazon, Apple, Facebook) have acquired and maintained monopoly power by exclusionary conduct, and blames this on alleged narrow vision and weak enforcement efforts of the U.S. antitrust agencies and courts. The MSRR proposes a near-total revision of U.S. antitrust, restoring the enforcement approaches of fifty years ago when per se rules and structural presumptions were predominant. Considering that the U.S. is the unquestioned leader in digital technology, and that the EU has far fewer leading digital technology firms but does have antitrust rules very much like those proposed by the MSRR, it seems that both the MSRR's view of the evidence and the logic of its proposals are questionable.

A MISSED OPPORTUNITY

BY A. DOUGLAS MELAMED[1]

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I. INTRODUCTION

The so-called "House Report," the lengthy report by the majority staff of the Antitrust Subcommittee of the House Judiciary Committee, assembles a large amount of interesting and often important information about competition in digital markets. It will be a valuable resource for those who want to understand the leading digital platforms. It is, however, a missed opportunity that falls far short of its stated objectives of examining "whether dominant firms are engaging in anticompetitive conduct" and whether existing antitrust laws "are adequate to address those issues."

The Report explains in some detail how many digital markets function, the role of network effects, the several entry barriers, and the tendency of those markets to tip so that one firm accounts for most or all of the revenues. While its analysis of market definition and market power is not rigorous, it certainly suffices to persuade at least this reader that the major platforms – Amazon, Facebook, and Google – very likely have market power in their core businesses – online commerce, social networks, and search.

The analysis of alleged anticompetitive conduct by the dominant firms and of the antitrust and policy issues raised by that conduct is less persuasive. One, perhaps understandable reason is that the staff chose breadth – discussion of a wide variety of behaviors involving numerous lines of commerce – over deep analysis of any of them. Less forgivable is the failure of the Report to define core concepts, including even the term "anticompetitive conduct." The Report seems to rest on the unstated assumption that aggressive conduct by a dominant firm to gain market share and revenues is anticompetitive when it harms rivals. That premise is inconsistent with existing law, and the Report nowhere addresses the difficult policy issues that need to be addressed in order to determine whether existing law is adequate or some other law would be better. Nor does the Report address the important issue of economic efficiency, which is central to antitrust law and policy and to economic welfare.

In the following paragraphs, I illustrate these shortcomings by examining, first, some conduct issues and, second, some related policy issues addressed in the Report.

II. ANTICOMPETITIVE CONDUCT

The Report discusses a vast range of behaviors by the dominant platforms – acquisitions, use of data, pricing, vertical integration, and alleged self-preferencing, among others. But, while it quotes provocative language from company statements and documents and uses manipulative language – misappropriation, predatory, and the like – it does not even attempt to identify the line between permissible and impermissible conduct. As a result, the reader cannot determine whether any particular conduct really was anticompetitive. Three among many possible examples, which happen to be three of the most common complaints about the platforms, illustrate the problem.

A. Facebook's Acquisition of Instagram

The basic facts are familiar. Facebook bought Instagram when the latter was much smaller than it is today and has overseen its growth into a major social network platform. The fundamental factual question that needs to be addressed to determine whether the acquisition, even with the benefit of hindsight, can be said to have been anticompetitive is whether the acquisition (i) strengthened Instagram and enabled it to be more successful and more valuable to users and advertisers than it would otherwise have been or (ii) prevented Instagram from growing into a more fundamental competitive threat to Facebook, or maybe even establishing a new social network paradigm. The Report does not directly address those issues.

Instead, the Report tries to assess the desirability of the acquisition on the basis of contemporaneous statements that appear to reflect at least some of Facebook's perceptions at the time. The Report notes that "Mr. Zuckerberg wrote that acquiring Instagram would allow Facebook to integrate the product to improve its service. But, he added, that 'in reality we already know these companies' social dynamics and will integrate them over the next 12-24 months anyway.' He explained: . . . one way of looking at this is that what we're really buying is time. . . . If we incorporate the social mechanics they were using," potential new competitors are less likely to succeed. The quoted language and the discussion in the Report surely suggest that the acquisition might have been about nipping a competitive threat in the bud. They do not, however, come close to proving that conclusion because they are equally consistent with a conclusion that the acquisition enabled Facebook to "incorporate the social mechanics" Instagram was using more quickly and at less cost than it could have done on its own, and thus enabled Facebook to provide a more efficient and valued social network sooner.

The Report does not stop there. It notes that "Mr. Zuckerberg suggested [to Instagram] that refusing to enter into a partnership with Facebook, including an acquisition, would have consequences for Instagram, referencing the product Facebook was developing at the time." One implication might be that Zuckerberg threatened Instagram, which was otherwise confident of its path to commercial success, with predatory retaliation in order to induce Instagram to sell to Facebook. But another possibility, not discussed in the Report, is that Facebook knew that it would eventually drive Instagram from the market because it could combine Instagram's "social mechanics" with its existing economies of scale and scope but that that route would be more costly and time-consuming than an acquisition. In substance, Zuckerberg might have presented Instagram with a choice of being driven from the market by lawful competition or sharing in the time and cost-saving efficiencies that an acquisition would create.

The drafters of the Report cannot be faulted for not knowing which explanation is correct. They did not have the resources of the enforcement agencies or a court. But they can be faulted for just assuming the correctness of one possible explanation and ignoring the others.

B. Agreements Making Google's Search Engine the Default

These are the subject of the Justice Department's suit against Google, and the undisputed facts are at the very least problematic. Google is the default search engine in its browser (Chrome) and in others that together account for 87 percent of browsers. Microsoft's Edge (4 percent) sets Microsoft's Bing as the default search engine. On its face, it seems clear that at least Google and Microsoft regard being the default search engine as valuable. Google very likely has monopoly power in search, and contracts that enable Google to be the default on a total of 87 percent of the principal means of distribution might well be a form of unlawful monopoly maintenance under the *Microsoft* case.

The *Microsoft* case, however, found to be unlawful only those agreements that served no efficiency purpose, so the question whether the default arrangements were efficient should be considered in order to understand whether they would be regarded as anticompetitive, at least under current law. Again, the Report focuses on facts from which inferences about effects and motives might be drawn. It notes that "Google executives closely tracked search defaults on Microsoft's Internet Explorer and expressed concern that non-Google defaults could impede Google Search. . . . Google recommended that users be given an initial opportunity to select a search engine and that browsers minimize the steps needed to change the default provider. These discussions, as well as the steep sums Google pays Apple and various browsers for default search placement, further highlight the competitive significance of default positions."

A complete investigation would inquire into how many, and how quickly, users of Microsoft Edge change the default browser. (The Justice Department complaint repeatedly alleges that very few users switch away from Google when it is the default search. That might reflect, not the difficulty of switching, but the superiority of Google search.) It is at least possible that switching is easy and common and that being the default benefits Google only because it gets to default status sooner and is thus able to acquire monetizable data sooner. In principle, the value of that time saving could be assessed and compared to the sums paid by Google for exclusive default status. If the sums paid exceed that value, the default agreements look like purchases of exclusion. If not, they might be efficient means of acquiring data. None of this is discussed in the Report.

C. Amazon's Acquisition and Use of Data

The Facebook and Google examples discussed above are mostly about conduct that allegedly preserved the dominant positions of those firms in their core businesses. The allegations about Amazon's acquisition and use of data are mostly about using Amazon's dominance to aid its expansion into complementary businesses. The Report describes the problem as follows:

> "Amazon leverages its access to third-party sellers' data to identify and replicate popular and profitable products from among the hundreds of millions of listings on its marketplace. Armed with this information, it appears that Amazon would (1) copy the product to create a competing private-label product or (2) identify and source the product directly from the manufacturer to free ride off the seller's efforts, and then cut that seller out of the equation. *** In one case, Amazon employees reportedly used non-public sales data."

The manipulative terminology – e.g. leverage, cut out, free ride – suggests something nefarious. The passage as a whole, however, describes conduct that, at least in a static sense, is unambiguously efficient and welfare-enhancing. Amazon is able to take advantage of its economies of scale (including in data) and scope to create and market products that are either more valuable to consumers or less costly to produce and distribute than their predecessors. As the Report notes, "[d]ata allows companies to target advertising with scalpel-like precision, improve services and products through a better understanding of user engagement and preferences, and more quickly identify and exploit new business opportunities."

It is not clear what the Report means by "cut that seller out of the equation." The language suggests that Amazon stopped distributing the seller's product after it developed its own. The Report does not address whether doing that reflected an efficient strategy of platform inventory management or entailed, instead, reduction of the value of the platform in order to aid Amazon's foray into the complementary product space.

It is conceivable that Amazon acquired the data unlawfully or, in the case of the alleged use of non-public data, used it in violation of some legal or contractual constraint. But it is at least equally likely – perhaps more likely, given the silence of the Report on the issue – that the data were either not confidential or, in the case of the non-public information, were acquired by an agreement with the seller that did not prohibit the referenced use by Amazon. In that event, there was nothing improper under existing law, except possibly a threatened unlawful refusal to deal used to coerce an unwitting firm to permit Amazon to use its proprietary data. Emulating other firms and trying to build a better mousetrap, which the Report characterizes as "free rid[ing]," are central to the kind of competition the antitrust laws are intended to promote. The Report discusses none of this.

III. RECOMMENDATIONS

The Report recommends increased funding for the enforcement agencies. That seems clearly correct. There is ample reason to think that the antitrust laws should be more aggressively enforced. Industry concentration is increasing, as is market concentration in at least some sectors. The large digital platforms are growing, seemingly inexorably, and appear to be beneficiaries of boundless economies of scale and scope. Merger retrospectives suggest that too many permitted mergers have resulted in price increases or other indicia of increased market power and that expected merger efficiencies are usually not realized. The case law appears to have tilted too far toward avoiding false positives, and a number of important recent cases (including *American Express* and *Qualcomm*) found anticompetitive conduct to be lawful.

The Report's other recommendations, however, are less persuasive. One reason is that the Report does not carefully assess existing law and thus does not make clear what problems the recommendations are intended to address. The Report could have used its study of the conduct of major digital platforms as a context in which to assess the antitrust laws. It could, for example, have identified the antitrust issues raised by the facts it assembled regarding acquisitions by the platforms or alleged self-preferencing by the platforms. These issues include how to evaluate mergers before one can know whether a nascent competitor will succeed absent the merger, how to police self-preferencing, how to make a non-discrimination requirement meaningful with respect to sales transactions when a sale to a corporate affiliate just moves money from one corporate pocket to another, and so on. And, after identifying the issues, it could have asked whether existing antitrust law is up to the task and, if not, how it might be improved.

The Report does none of that. Nor does it discuss the costs and benefits of its recommendations. The recommendations seem to rest on the notion that the dominant digital platforms are big, aggressive and growing, and that laws intended to reign them in are therefore desirable. The issues are more complicated. This can be seen by considering some of the recommendations that appear intended to address the kinds of conduct discussed above.

A. Merger Restrictions

The Report recommends prohibiting all "acquisitions of potential rivals and nascent competitors." The Report states that Facebook, Google, and Amazon have acquired more than 423 companies. The vast majority would probably qualify as potential or nascent competitors and were probably firms that would not have become important competitors absent the acquisition, and whose acquisition gave the acquiring firm valuable human and technical resources that improved their products. It is likely that some of the acquisitions prevented the acquired assets, whether separately owned or after acquisition by a third party, from growing into an important competitive force whose presence would have increased economic welfare.

The policy issue is whether existing merger law is capable of identifying the problematic mergers and, if not, what changes would on balance improve the law. A flat prohibition on all acquisitions of potential and nascent competitors would be likely *ex post* to prevent a multitude of procompetitive transactions and *ex ante*, by cutting off a valuable exit strategy for venture capital investments, to deter some valuable investments and resulting innovations. The Report makes no effort to assess the costs and benefits of its proposed prohibition.

Nor does it discuss narrower alternatives. One would lower the pre-merger reporting threshold, so that more acquisitions of start-ups would be subject to pre-merger review by the enforcement agencies. As the Instagram story makes clear, however, pre-merger review does not solve the very difficult problem of determining whether a merger of a small and growing firm will turn out to be good or bad.

One aspect of the Report's recommendation might itself make sense as a narrower alternative. The recommendation would prohibit mergers without proof "that the potential or nascent competitor would have been a successful entrant in a but-for world." It is generally thought that current law prohibits only those mergers that are more likely than not to harm competition. One implication is that acquisition of a nascent competitor will be lawful if the acquired firm would have been unlikely to grow into an important competitive force absent the merger, even if the acquisition offered insubstantial efficiency benefits and would extinguish a small but realistic possibility that the acquired firm would otherwise develop into the Next Big Thing. Perhaps merger law should be revised or understood to prohibit mergers whose expected value – taking into account magnitudes and likelihoods – is negative even if a positive outcome is more likely than not. Regrettably, the Report did not address this possibility.

B. Monopolization Law

The Report does not make a specific recommendation about agreements to obtain default placement of digital applications, but it does recommend a number of changes intended to "rehabilitate monopolization law." Current law rather clearly holds that conduct that tends to create or maintain monopoly power and has no efficiency benefits is illegal and that conduct that does not tend to create or maintain monopoly power is not illegal. The hard question arises when the conduct does both, which might be the case with the agreements that make Google's search engine the default on the Safari (Apple) and Firefox browsers. Courts usually avoid that question by finding either no harm or no benefit or by finding a less restrictive alternative, but those solutions will not always be available.

There are three basic alternatives for dealing with conduct that both excludes rivals and creates efficiencies. One, implicit in the Report, is to ignore the efficiencies and find the conduct to be illegal. That alternative could be very costly for welfare and might deter important innovations. Another, which seems implicit in some cases, is to ignore the harm to competition and find the conduct to be legal. That alternative risks permitting substantial harm to competition for what might be trivial efficiencies.

The middle ground would try to take account of the competing effects. Ad hoc balancing is optimal in theory but often impossible in practice. How, for example, does one compare a static harm to competition against the kind of dynamic benefits from permitting exploitation of monopoly power that the Court emphasized in *Trinko*? Scholars have suggested variations, like enabling the decision maker to paint with a broader brush by condemning only conduct that causes harm that is "disproportionate" to the efficiency benefits. Google's default agreements might be condemned under that approach on the ground that they tie up 87 percent of browser distribution and, unless switching is really trivial, all but ensure the perpetuation of Google's search monopoly. Alternatively, the law might condemn only conduct whose efficiency benefits for the defendant are less than the cost of the conduct to the defendant and thus makes no business sense as a strategy for realizing efficiencies. This approach might find Google's agreements to be lawful if the price Google paid for them was less than the anticipated value of the additional data they could reasonably have been expected to provide to Google. One can find support for each of these alternatives in the cases.

The Report could have made a valuable contribution if it had addressed the issues raised by conduct that both excludes rivals and creates efficiencies, either in general or with respect to the dominant digital platforms in particular. Instead, it ignored the efficiency part of the story and elided the critical antitrust question.

C. Structural Separations and Nondiscrimination

The Report recommends consideration of a number of reforms to address problems that can arise when a dominant platform competes in complementary businesses with other firms that need access to the platform. The reforms include "structural separations" to "prohibit a dominant intermediary [like Amazon] from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure," non-discrimination rules to prevent self-preferencing by the platforms, and prohibiting the platforms from extracting "greater money or data than users would be willing to provide in a competitive market." All are intended to prevent the platforms from disadvantaging complementary businesses operated by third parties that need access to the platforms in order to benefit competing complementary businesses owned by the platforms.

The Report repeatedly says that dominant platforms "can" harm competition against its affiliated complementary business, but it does not assess the frequency of those harms. It seems to assume, without discussion, that harm of that sort is commonplace. Economic analysis suggests, however, that a dominant platform will have an incentive to engage in such handicapping only in some instances, most of which would entail a likely creation or preservation of market power in the complementary business. In other instances, a platform like Amazon will not have an incentive to handicap complementary businesses in order to aid its own complementary business because doing so would reduce the value of the platform itself.

Nor does the Report address the costs and benefits of the rules it proposes. Those rules could be beneficial to the extent that they preserve valuable competition and incentives for investment and innovation in lines of business that might be dependent on access to the platform. But they could also have large costs. These would include static costs, like preventing the efficiencies resulting from Amazon's use of data to improve products, and dynamic costs, which could include preventing important innovations by the platform in both the complementary business and the platform itself. As to the latter, the Report recommends without explanation prohibiting any "design change that excludes competitors or otherwise undermines competition . . ., *regardless of whether the design change can be justified as an improvement for consumers*" (emphasis added).

The Report says that a simple separation requirement has the benefit, compared to rules that would permit vertical expansion and prohibit anticompetitive conduct by the platform directed at competitors, of being "easier to administer than conduct remedies, which can require close and continuous monitoring." The benefit is, however, overstated because a separation requirement needs an accompanying non-discrimination rule to prevent the platform from engaging in the same anticompetitive conduct as a result of, or pursuant to, contractual arrangements with complementary businesses owned by third parties. A separation requirement also needs ongoing monitoring to address boundary issues that arise as industries and technologies evolve over time. The Report does not address these complexities.

IV. CONCLUSION

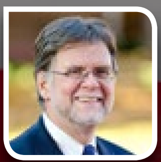
The Report's first recommendation is that Congress consider making clear that the antitrust laws "are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals." Using the antitrust laws to address all these worthy objectives is problematic, in part because any law that has multiple and often conflicting objectives risks arbitrary and unpredictable decisions and is more susceptible to regulatory capture than a law whose enforcement and judicial decisions can be assessed by an unambiguous metric. These risks seem especially serious with antitrust law because it applies to almost all sectors of the economy, is enforced in a decentralized system by a multitude of potential plaintiffs, and is therefore applied to divers and often complex commercial problems.

The recommendation is problematic for another reason. All of the proposed objectives are distributional in nature. The recommendation implicitly sees the issues raised by the platforms, and perhaps antitrust law in general, as issues of the powerful harming the powerless and recommends a host of changes to redress that imbalance. There is in that recommendation, and indeed in the Report, almost no attention to economic welfare as a whole. For all practical purposes, the Report ignores considerations of economic efficiency.

The antitrust laws are presently focused solely on economic welfare. Adding additional objectives matters only to the extent that doing so would result in decisions different from those focused on economic welfare. Those decisions are likely to reduce economic welfare. The recommendation of adding objectives, and indeed antitrust law in general, cannot be assessed without discussing economic welfare and efficiency. ■

UNDERSTANDING THE HOUSE JUDICIARY COMMITTEE MAJORITY STAFF ANTITRUST REPORT

BY WILLIAM E. KOVACIC & D. DANIEL SOKOL[1]



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I. INTRODUCTION

The U.S. antitrust system is undergoing a profound reassessment. In several areas of antitrust enforcement, the searching reexamination of the system's aims, methods, and effectiveness is having evident effects. Since mid-October, government antitrust agencies have filed a total of five lawsuits alleging illegal monopolization by leading tech firms -- two against Facebook and three against Google. In the past twelve months, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have launched a number of challenges to mergers in which the theory of harm involves the absorption of a promising new enterprise by a well-established rival. Antitrust, under its existing tools and with the use of an economics effects-based approach, is going after some of the most high-profile companies of the world.

Many events and commentaries have inspired this upheaval. Among the most important is an inquiry conducted over the past two years by the House Judiciary Antitrust Subcommittee on Antitrust, Commercial and Administrative Law. On October 6, the Subcommittee released a Majority Staff Report on the *Investigation of Competition in Digital Markets* (Report). The Report's 459 pages are divided into three parts: a detailed examination of Amazon, Apple, Facebook, and Google; a set of policy recommendations; and an appendix of mergers and acquisitions undertaken by the four companies.

The Report nominally addresses "competition in digital markets," but its policy agenda is much broader. The Majority Staff proposes to fundamentally redesign basic elements of the entire U.S. antitrust system, not only concepts involving big tech. The Majority Staff urges Congress to repudiate, in whole or in part, fifteen court decisions (thirteen from the Supreme Court, one by a court of appeals, and one by a district court). The broader implications of these proposals have received relatively little attention.

There is a striking difference in how the Report presents the case studies of the four tech giants and how it identifies the disfavored precedents. The case studies are elaborate and rich in detail; the discussion of the doctrinal reforms, many with great significance for the entire U.S. antitrust system, is slim by comparison.

In this essay, we pose questions about the Report's larger implications in three areas: (1) the restatement of antitrust system objectives; (2) doctrinal changes involving antitrust procedure; (3) doctrinal changes involving antitrust law's substantive commands. Overall, we worry that the House Judiciary Committee Report, in its abbreviated discussion of doctrinal reforms, has not come to grips with what Professor Phillip Areeda would have called the "administrability" implications of overriding certain precedents and replacing them with new decision-making principles. Meeting Areeda's administrability challenge would have called for the Report to offer a more detailed vision of the doctrinal framework that would replace the *status quo* and to discuss how enforcement agencies and courts would apply thenew framework effectively in practice.

II. GOALS

The Report (page 391) recommends an important restatement of the goals of the U.S. antitrust system:

[T]he Subcommittee recommends that Congress consider reasserting the original intent and broad goals of the antitrust laws, by clarifying that they are designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.

One can imagine a number of scenarios in which tensions among these stated aims might arise. The Report does not suggest a hierarchy of values or a methodology for resolving tradeoffs. Consider two examples in which conflicts might occur and would require courts or enforcement agencies to determine a primacy of aims and an approach for their application.

First, as we discuss more fully below, the restated framework might spur a basic change in the analysis of agreements among competitors. For example, it might accept efforts by a group of small construction firms to justify bid rotation agreements on the ground that such arrangements, by distributing a limited amount of work to all participating firms, enabled all of the companies to remain in business and avoid laying off employees. The arrangement would raise the price paid by purchasers of construction services but could also keep independent businesses alive and save the jobs of their workers.

Second, the concept of a fair economy might tolerate efforts by producers to reduce output in ways that raise prices but arguably control harmful market externalities. In the 1920s and 1930s, the application of the rule of capture to determine ownership in underground petroleum reservoirs led to races by surface property owners to produce crude oil as fast as possible without regard to the larger social interest in conserving this valuable resource and achieving what we today would call environmental sustainability. Should the trial court in *United States* *v. Socony Vacuum Oil Co.*[2] have instructed the jury to consider an argument by the defendant refiners that their concerted plan to curb gasoline output alleviated the impact of improvident production practices that expanded supply but generated negative economic and social externalities?

What would these scenarios mean more generally to the application of the *per se* rule against collusion? Might not a significant number of arrangements now treated as illegal *per se* be entitled, at a minimum, to analysis under a more elaborate (and more forgiving) rule of reason? The effectiveness of existing U.S. criminal prosecution of cartel offenses depends substantially on the ability of the DOJ to argue before juries (or more likely accept a plea because parties are risk-averse to jury trials) that the defendants engaged in conduct clearly denominated as inherently illegal. Would an expansion in the scope of cognizable defenses eliminate this clarity and diminish the willingness of juries to return guilty verdicts in criminal cases?

In making its case that U.S. antitrust law should embrace multiple goals beyond serving the interests of citizens as consumers, the Report is not clear as to what analytical standard to follow. Is it an economic-based standard (not always clear in the Report)? If not, what other considerations should inform the application of the law, and how should courts (or agencies) mediate across the different possible factors in terms of a hierarchy of different goals? The Report does not grapple with this important issue.

Overall, it is vital to have a clear statement of the calculus that courts and enforcement agencies should use in substantive antitrust analysis.[3] When legal presumptions are arbitrary, this is problematic and ripe for abuse by both government and private parties. Indeterminacy in law also threatens business planning and investment. It is a fair argument that the benefits of a more diverse goals structure warrant toleration of greater arbitrariness and indeterminacy in the application of the antitrust laws. It is difficult to make that judgment without a fuller description of the method by which the new goals framework will be made operational in the routine development and resolution of cases. The Report falls short in this regard.

III. ANTITRUST PROCEDURE

The Report proposes repudiating three Supreme Court decisions that establish major pillars of modern antitrust procedure. First, the Report recommends the elimination of the "antitrust standing" requirement established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*)[4] In this case, the Supreme Court wrestled with an issue that courts confront in many areas of the law: how proximate must the plaintiff be to the injurious conduct in order to obtain relief? In his opinion for the Court majority in *AGC*, Justice John Paul Stevens situated antitrust law in context of other legal domains in which the issue had arisen, and then discussed the advantages and disadvantages of different approaches for defining the requisite proximity. Acknowledging the imperfections of all possible solutions, Justice Stevens set out the Court's preferred standard along with criteria for its application. Does the Staff Majority desire to eliminate the proximity requirement entirely in deciding who might seek damages for an antitrust offense? Or did the Staff Majority have an alternative proximity test in mind? Might it have been desirable, in setting a basis for this recommendation, to take testimony from current and former federal district judges with experience in applying *AGC*'s standing requirements?

The Report also urges the repudiation of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[5] where the Supreme Court established the requirement that a plaintiff seeking damages for an antitrust offense show that it had suffered "antitrust injury" – harm relating to a reduction in competition.[6] As the Court presented the facts In *Brunswick*, the effect of the challenged merger had been to enable failing bowling alleys to remain in business. Consumers presumably benefitted.

The *Brunswick* plaintiffs were rivals to the distressed enterprises. As recounted in Justice Thurgood Marshall's opinion for a unanimous court, "the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares."[7] The plaintiffs' measure of damages was profits assuming that their rivals exited the market minus profits with the rivals continuing in business. The Su-

2 310 U.S. 150 (1940).

3 See Roger D. Blair & D. Daniel Sokol, The Rule of Reason and the Goals of Antitrust: An Economic Approach, 78 Antitrust L.J. 471, 472 fn. 8 (2012) ("there can be only a single goal if one values consistency and logic.").

4 459 U.S. 519 (1983).

5 429 U.S. 477 (1977).

6 We infer that the Majority Staff also would intend to repudiate a related case not mentioned in the Report. See *Cargill, Inc. v. Monfort of Colorado,* 479 U.S. 104, 116 (1986) ("Brunswick holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden in the antitrust laws.").

7 *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 484 (1977).*

preme Court reversed the decision of the court of appeals that had allowed the plaintiff to proceed with its claim for damages.[8] Justice Thurgood Marshall's opinion for the Court warned that upholding the lower court's decision would make all merger-related disruptions in the market actionable in damages "regardless of whether those dislocations have anything to do with the reason the merger was condemned."[9]

Does the Majority Staff believe the Supreme Court should have upheld the plaintiffs' trebled claim for lost profits? In support of *Brunswick* ruling, Justice Marshall quoted the admonition, expressed twice, in *Brown Shoe Co. v. United States*[10] that the proper aim of antitrust law is "the protection of *competition*, not *competitors*."[11] Does the Report mean, at least by implication, to repudiate the use of this language by the Court in *Brown Shoe*?

Last, the Report proposes "lowering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*." In *Twombly*,[12] the Supreme Court approved a motion to dismiss on the ground that the plaintiff had failed to plead sufficient facts to establish a plausible claim of horizontal conspiracy. What less-heightened pleading standard would the Majority Staff propose to replace *Twombly*'s plausibility requirement – for example, a return to notice pleading? Here, again, would it not have been desirable, before altering a foundation of modern antitrust procedure, to take testimony from current and former federal district judges who have applied *Twombly* in antitrust cases and to seek their views about how best to define what a plaintiff must plead to avoid a motion to dismiss?

Finally, it seems to us that an evaluation of the antitrust system's procedural barriers to the prosecution of claims should assess the wisdom of the Supreme Court's decision in *Illinois Brick Co. v. Illinois*.[13] Decided in the same year as *Brunswick*, *Illinois Brick* ruled that only direct purchasers have standing to obtain damages from firms accused of violating the antitrust laws. The Report omitted discussion of whether it is time to repeal *Illinois Brick*.

IV. SUBSTANTIVE ISSUES

Antitrust law, in merger and nonmerger cases, employs presumptions to evaluate conduct and allocate burdens of proof and production. Courts rely on various considerations to decide what kinds of evidence are relevant to evaluating business conduct – for example, in recognizing a conclusive presumption of illegality for certain agreements among competitors. Relevant factors in creating presumptions have included the courts' own experience with the practice in question, learning from economics, and perceptions of the institutional competencies of judges and juries to undertake certain inquiries.

The Report's recommendations would affect a number of presumptions, conclusive and rebuttable, that support the operation of the existing U.S. system. Below we highlight potential implications of some of the Report's proposed changes in substantive legal tests.

A. Relaxing Horizontal Prohibitions

The Report could foster a fundamental rethink of doctrine that governs antitrust treatment of horizontal restraints. In *United States v. Topco Associates*,[14] the Supreme Court used a rule of *per se* illegality to condemn an agreement by smaller chains of independent grocers to impose territorial restrictions on the use of a brand established by joint venture of the grocers. Does the Report anticipate the abandonment of *Topco*, or at least the rejection of the *per se* rule of illegality that the Court applied to condemn the territorial restrictions? Is collusion is no longer to be viewed as the "supreme evil of antitrust"[15] when smaller enterprises or individual entrepreneurs form alliances to combat large, entrenched business enterprises or to bargain for fair wages or other terms of commerce? Does a relaxation of restrictions on horizontal practices eventually restore *Appalachian Coals, Inc. v. United States*[16] and its toleration of concerted output restrictions to deal with economic distress or require some moderation, as suggested above, of the hardline approach approved in *Socony Vacuum*?

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8 *Id.* at 489-91.

9 *Id.* at 487.

10 370 U.S. 249, 320, 344 (1962).

11 *Brunswick Corp.*, 429 U.S. at 488 (quoting Brown Shoe Co., 370 U.S. at 320) (emphasis in original).

12 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

13 431 U.S. 720 (1977).

14 *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

15 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

16 *Appalachian Coals v. U.S.*, 288 U.S. 344 (1933).

The Report may cast doubt on other cases that limit the ability of associations and their members to cooperate in ways that courts have condemned as illegal collusion.[17] In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n* (*Trial Lawyers*),[18] the Supreme Court concentrated on the limits of the *Noerr-Pennington* doctrine and a group boycott by lawyers attacking low fees paid for legal services for indigent defendants. The Court focused on the nature of the competitive harm, which flowed from the boycott rather than the government action in setting the rates. Would the Report elevate consideration of the First Amendment values emphasized by the court of appeals in *Trial Lawyers*,[19] or repudiate the Supreme Court's refusal to consider the "social justifications proffered for... [the] restraint of trade"?[20] Does the Report reject the Court's view that "it is not our task to pass upon the social utility or political wisdom of price-fixing agreements"[21] – at least the suggestion that a court may not consider broader social interests (e.g. related to the maintenance of a "fair economy") in applying the Sherman Act's prohibition on restraints of trade?

In *National Society of Professional Engineers v. United States*,[22] the Supreme Court confronted arguments that antitrust law should be applied with a lighter touch in markets for professional services and restrictions on competitive bidding are appropriate in this domain because their customers would not understand that such bidding denies them important non-price, quality-related benefits. In that case, the Supreme Court answered expressly, "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[23] Is this assumption now to be weakened or overridden, as well?

As a related matter, does a relaxation of horizontal restraints for media organizations mean that *Apple/e-books*[24] was wrongly decided? Should the courts in that matter have accepted the argument that the Sherman Act should tolerate a combination by one Big Tech platform (Apple) and book publishers to raise prices for the purpose of facilitating entry to challenge another Big Tech platform (Amazon)? If applied in *Apple/e-books*, such an approach would have overridden antitrust's most important and high-profile victory against a Big Tech company since *United States v. Microsoft.*[25] One can argue that, at a minimum, the agreement between the publishers was a criminal offense (and one might query why the DOJ did not prosecute this conspiracy as a crime) because of the naked price fixing. One also could argue that Apple fully understood the nature of the publishers' collective action and willingly facilitated the attainment of their collusive aims. Does this mean that antitrust should also relax the criminal prohibition for collusion that is claimed to be designed to promote new entry – at least if the collusion involves media companies?

B. Proving Efficiencies for Mergers

The Report suggests that firms be required to prove the efficiencies of mergers. No decided antitrust case has been won specifically by the application of an efficiencies defense, although the recent *T-Mobile/Sprint* case comes closest.[26] The empirical merger literature shows that the impact of mergers is ambiguous. The finance literature gives many reasons for the lack of merger efficiencies. Few of these have anything to do with antitrust, such as issues of poor quality of corporate governance by the acquiring firm, poor merger execution and integration, the nature of CEO incentives, the implications of CEO and board connections, firm level ownership structure issues, financing of the deal and the related sources of financing, if the acquisition target is a distressed firm, relevant factors include the nature of

17 *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

18 493 U.S. 411 (1990).

19 *Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 233 (D.C. Cir. 1986).

20 *Id.* at 424.

21 *Id.* at 423.

22 435 U.S. 679 (1978).

23 *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978).

24 *United States v. Apple Inc.,* 791 F.ed 290 (2d Cir. 2015).

25 253 F.3d 34 (D.C. Cir. 2001).

26 *New York v. Deutsche Telekom AG*, 439 F.Supp.3d 179, 217 (S.D.N.Y. 2020) ("In sum, the Court concludes that Defendants' proposed efficiencies are cognizable and increase the likelihood that the Proposed Merger would enhance competition in the relevant markets to the benefit of all consumers. However, mindful of the uncertainty in the state of the law regarding efficiencies and Plaintiff States' pertinent criticisms, the Court stresses that the Proposed Merger efficiencies it has recognized constitute just one of many factors that it considers and do not alone possess dispositive weight in this inquiry.").

post-merger restructuring, target acquisitiveness, broader macro issues of political economy, and issues of governance spillovers.[27]

Does the Report effectively seek to create a *de facto* merger ban? Having to prove the efficiencies of certain decisions leaves little room for the exercise of business judgement and the possibility that even intended benefits may not materialize. This would place antitrust out of step with corporate law that provides boards of directors the benefit of the business judgement rule with the valid exercise of informed decision-making.[28]

C. The 30% Bright Line Rule of Monopoly Power

Typically, under current law, the difference between market power and monopolization requires more than just a market share presumption. It requires behavior that is improperly exclusionary or predatory. The ability to engage in such conduct with only a 30 percent market share, which the Report proposes as a threshold for identifying dominance, is uncommon. The bright line rule also seems to go against economic principles. Case law currently requires an understanding of the nature of the power as well as its impact on the conduct.[29] The Report's new bright line rule also changes the burden (potentially) in a monopolization case because the current formulation focuses on effects rather than on mere market concentration.[30]

The proposed bright line rule retreats from global best practices that focus on economic effects rather than inferring adverse effects from market share. As the Organization for Economic Cooperation and Development has stated, "Although market share based presumptions of substantial market power might be a convenient tool for a decision maker, their use raises many of the same problems as the use of market shares in general. Market shares can fail to correctly predict whether a firm has substantial market power. Thus, market share-based presumptions must be used with great caution."[31] Missing from the Report's analysis of the bright line rule is a discussion of competitive effects. For example, the Report excludes important aspects to competitive analysis of the strength of market power such as barriers to entry, the ability of incumbents to reposition, efficiencies, contestability, and the role of mavericks among other issues. If there is no substantial market power, then there is no need to take the additional step to determine if there are anticompetitive effects.

D. Making a Design Change a Violation of Section 2, Regardless of Whether the Design Change can be Justified as an Improvement for Consumers

In 1959, Volvo introduced the three-point seatbelt. Since 1959, every major car manufacturer has copied this invention. Presumably, under the Report, this type of innovation could run afoul of Section 2. To ban product design copying even when consumers benefit seems ludicrous. As the Areeda & Hovenkamp treatise concludes, "no responsible commentator proposes to subordinate the public and consumer interest in better products to the preservation of less inventive rivals. If a court were to attempt to do so, moreover, it would find itself without any criteria for comparing the consumer's losses to the protected firm's gain; there is no social calculus for the 'right' amount to penalize consumers in favor of certain producers."[32]

Overriding design changes also leads to related questions. By overturning *Allied Orthopedic*,[33] which required a procompetitive justification, what does this do to *Microsoft*,[34] which cautioned that courts should "properly [be] very skeptical" about product design claims.[35] The comment that even pro-competitive innovation should be forbidden overturns at least that part of the *Microsoft* opinion. Is the rest of *Microsoft* left intact? Does this mean that *Berkey Photo*[36] is also overridden? Innovation-based rivalry is typically pro-competitive. Is overriding it just limited to platform tech? What about pharma cases such

27 Luc Renneboog & Cara Vansteenkiste, Failure and success in mergers and acquisitions, 58 J. Corp. Fin. 650 (2019).

28 See e.g. *Smith v. Van Gorkom*, 488 A.2d 858, 874 (Del. 1985); *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *Corwin v. KKR Financial Holdings LLC,* 125 A.3d 304 (Del. 2015).

29 See Herbert Hovenkamp, The Antitrust Enterprise: Principle and Execution 157–58 (2006).

30 *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

31 OECD, Evidentiary Issues in Proving Dominance 2006 at 8.

32 Areeda & Hovenmap ¶781.

33 *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group.*

34 *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

35 *Id.* at 65.

36 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir. 1983).

as *Doryx*[37] that focus on changes in product design that yield procompetitive benefits?

E. Overriding Brooke Group

Does overriding the predatory pricing recoupment in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[38] also seek to rehabilitate the approach to primary line price discrimination in *Utah Pie Co. v. Continental Baking Co.*[39]? Does the Report anticipate a basic revival of enforcement of the Robinson Patman Act – with its expressed concern for improper discrimination – as a core element of government antitrust enforcement? The Report does not explicitly try to revitalize Robinson-Patman but the concern for competitors throughout the Report suggests that Robinson-Patman revitalization via the backdoor is possible.

V. CONCLUSION

From time to time as academics, we referee book manuscripts for publishing companies. If asked to review the Majority Staff Report for publication as a book, we would focus the publisher's attention on the Report's proposal that Congress repudiate, in whole or in part, various judicial decisions the authors regard as unwise constraints on antitrust enforcement. Our suggestion would be to "revise and resubmit" to address more completely the implications for the U.S. antitrust system that withdrawing or modifying these decisions would entail. We would add a conclusion to the Report that recognized clearly what we have indicated here: that the Report calls for basic change in the U.S. antitrust regime as a whole and not simply its treatment of big tech.

From personal experience, we understand the constraints that a congressional committee and its staff face in preparing a report that distills the learning from extensive hearings and derives policy recommendations.[40] The only people who think this is an easy thing to do have never done it – especially to meet ambitious deadlines that take little account of the complexity of the undertaking. The Majority Staff Report on the *Investigation of Competition in Digital Markets* is the joining up of two documents. One is a collection of detailed case studies that will serve as an important reference for years to come. This is an achievement, especially if the Committee releases the testimony of academics who were asked to comment on changes to antitrust law, despite earlier promises made by staff to do so. Such transparency would allow the policy community to better understand what, if any, consensus appears on issues. Other testimony that is not confidential also would be helpful should it be released. As a comparative note, one of the benefits of the bipartisan Antitrust Modernization Committee ("AMC") Report is that submissions were public, which allowed for detailed study and justification of the positions taken by the AMC. A non-bipartisan Congressional staff report would benefit from the legitimacy that greater transparency would offer.

The second major element of the Report is a body of recommendations set out with different levels of completeness and reflection. Some policy proposals are described more fully and linked to the case studies. Others resemble Tweets – cryptic, thought provoking, and begging for more context and elaboration. The doctrinal reversals sketched (hurriedly, perhaps) at the Report's end have major implications for the entire U.S. antitrust system, not only its treatment of tech giants. These changes require deeper analysis and discussion. In this sense, the Report's final pages are not a conclusion but instead a beginning – the first draft of an agenda for new deliberations that consider the doctrinal, procedural, and institutional foundations of the U.S. antitrust regime. The alternative is that this was a list of long held aspirations of various groups but not thought out, in part because these are complex issues and to give them the treatment that they deserve would have required a series of hearings and submissions like the AMC. ■

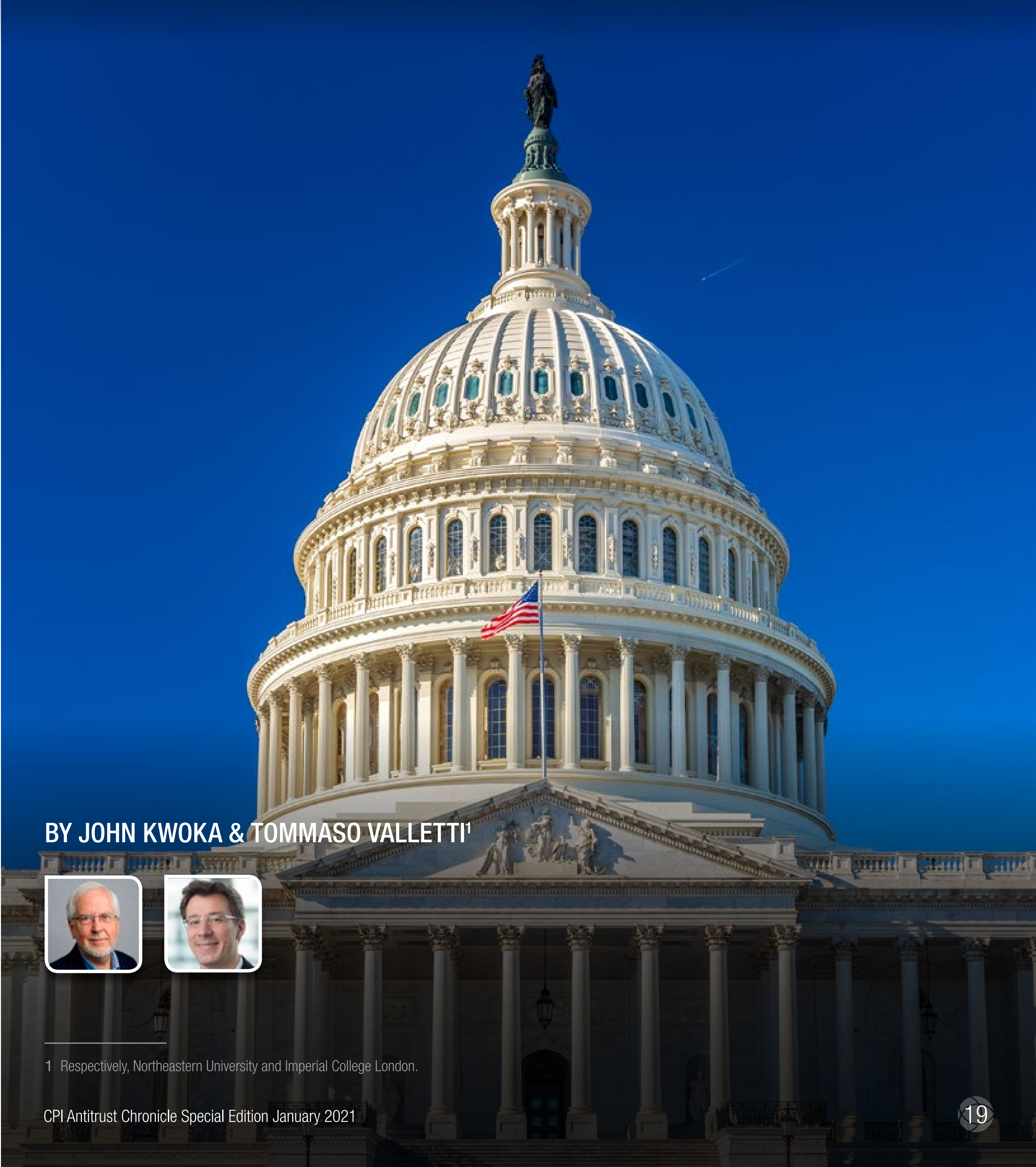
37 *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co*., 838 F.3d 421, 439 (3d Cir. 2016) ("Defendants were motivated by an intent to compete with generics, the evidence nonetheless demonstrates that Defendants' product modifications had no anticompetitive effects on the market.").

38 509 U.S. 209 (1993).

39 386 U.S. 685 (1967).

40 One of us (Kovacic) spent a year (1975-1976) as a research assistant for the majority staff of the Senate Judiciary Subcommittee on Antitrust and Monopoly as the Subcommittee prepared reports on what became the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and a proposal to restructure the petroleum industry (the Petroleum Industry Competition Act of 1976).

COMPETITION — AND COMPETITION POLICY — IN DIGITAL MARKETS: THE HOUSE REPORT



BY JOHN KWOKA & TOMMASO VALLETTI[1]

1 Respectively, Northeastern University and Imperial College London.

I. INTRODUCTION AND SUMMARY

The House Antitrust Subcommittee has concluded its milestone study of Amazon, Apple, Facebook, and Google with a lengthy report entitled "Investigation of Competition in Digital Markets." Despite that title, the report is in fact not so much about the weakness of *competition* in digital markets as it is a report on the weakness of *competition policy* toward digital markets. After all, the bulk of the report documents the unimpeded rise to dominance of these giants over online search, ecommerce, social media, and advertising, and how this dominance has "diminished consumer choice, eroded innovation and entrepreneurship in the U.S. economy, weakened the vibrancy of the free and diverse press, and undermined Americans' privacy." Since these objectives and values are very much the mission of antitrust and other public policies, there is no escaping the fact that it is the failure of those policies and institutions that has resulted in these harms.

To be sure, there have been other contributing factors, from novel technology to agency resource constraints, but evidence of the responsibility of policy is in plain sight. In the face of a tsunami of acquisitions by the tech companies — some 800 over the past 20 years — the antitrust agencies have been spectators. The Federal Trade Commission and the Antitrust Division of the Justice Department have conducted formal investigations in only a handful of cases, and have prohibited exactly none, zero, out of these hundreds. There have been endless reports of anticompetitive conduct by these companies, including self-preferencing and other forms of bias, tying and predatory conduct, misuse of competitors' and consumers' data, and the like. In the few cases where the agencies did not dismiss these concerns out of deference to apparent "efficiencies," they have ended their inquiries with remedies that have proved largely ineffective.

In short, the tech companies could hardly have hoped for a more tolerant policy toward their rise to dominance. In response, the House report now offers a total of 13 recommendations across three broad areas: Restoring Competition in the Digital Economy, Strengthening the Antitrust Laws, and Strengthening Antitrust Enforcement. All of these have merit. Many are familiar from experience in other industries. A number seem likely to attract support in congress and the agencies.

But it is our view that among all of the report's policy recommendations, one is of over-riding importance. It is of over-riding importance because it is the single most potent policy initiative; because without it, other recommended policies are not likely to suffice; and indeed, because this one policy can lessen the need for other policies.

This singularly important policy is structural separation, that is, breaking up the firms. As we explain below, structural separation is likely the only way to truly re-orient these companies' incentives toward customers, rivals, and competition, to limit their ability to engage in anticompetitive actions, and to permit the antitrust agencies to step back from on-going intense regulation of these companies. Structural separation would drastically diminish if not eliminate self-preferencing, tying, and other such practices by these companies, relieving the agencies of the burden of identifying, challenging, proving, and seeking to remedy each such instance of anticompetitive behavior. Structural separation would embed these companies firmly in markets where they face rivals that could challenge their positions and where they would have to focus on serving customers better rather than handicapping their rivals.

It is therefore to the credit of the House report that it lists as its first recommendation "Structural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business." But in the past and predictably in the case of the House report, that recommendation is greeted with the dismissive statement that it is operationally impossible to undo big firms, or more costly than any possible benefits, or inferior to other policies. While evidence for these objections is notably scarce, this criticism has served to sideline that strategy whenever it is advanced as a possible solution.

We disagree with these criticisms.[2] The reality is that antitrust and regulatory policy has not infrequently broken up firms in a wide variety of markets. Companies themselves routinely divest nearly as many businesses as they acquire each year. Digital companies in particular engage in an endless pattern of acquisition, assessment, and divesting of businesses. Claims that structural separation is impossible do not survive even the most cursory examination of the evidence. Moreover, when breakups and divestitures do happen, they have been accomplished without a record of disastrous consequences for either the core company or the divested operations. Indeed, the record suggests that breakups of most such companies have been operationally successful and competitively beneficial. And finally, when structural separation has been rejected in favor of other policies, that record is replete with failures of the latter. Indeed, it is these very failures of weak policy toward the tech companies that have brought us to this point.

2 Our full case is made in "Scrambled Eggs and Paralyzed Policy: Breaking Up Consummated Mergers and Dominant Firms, J. Kwoka & T. Valletti, forthcoming, Industrial and Corporate Change, 2021. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613.

II. STRUCTURAL SEPARATION

A few examples illustrate these various points. With respect to the feasibility of breakups, consider the cases of American Tobacco and Standard Oil, both restructured by judicial action in 1911. Standard was the easier case since the mandated restructuring — into a total of 34 separate companies — was along geographic lines. American Tobacco was a more fully integrated national company but it was nonetheless successfully turned into three distinct companies and in a period no greater than eight months. In both cases true competition was slow to emerge but the break ups themselves were accomplished without the disruption or disaster that was predicted.

More recently, the *AT&T* divestiture was asserted by the company and many outsiders to be literally impossible, or certain to cause the collapse of the industry if accomplished. Neither of those predictions was remotely accurate. The vertical and horizontal breakup of this enormous company into eight parts was achieved in the two-year time frame imposed by the court, with widely acknowledged benefits to consumers and businesses alike. While some have criticized the extended role of the court, it is useful to note that was in no small part because of the obstructive actions of the post-divestiture companies, an experience worth studying to ensure that future breakups of firms proceed more smoothly.

In the more recent *Microsoft* case, the trial court ordered the company to be broken up in ways that reflected the natural divisions within the company. One division would consist of its core operating system, that is, Windows, while the second would encompass its numerous derivative applications, headed by Office. This structural remedy was rejected on judicial appeal, resulting in protracted hand-to-hand combat between the company and the court in an effort to gain compliance with a complex rules-based decree. As we discuss below, this effort to find an alternative to structural separation has its own lesson, namely, the near-impossibility of using a conduct-oriented order to prevent anticompetitive actions by such a company.

It is also worth bearing in mind that regulators in many countries have restructured numerous large companies in several industries in order to enhance competition. British Rail and British Telecom ("BT") in the UK; telecoms throughout Europe as well as AT&T in the U.S.; and scores of large electric power companies in the U.S. and throughout the world have all been broken up. For reasons worth studying, some breakups have been more successful than others in fostering competition, but operationally there are numerous cases in which two or more companies have been successfully carved out of a single dominant firm as a result of policy action.

Interestingly, breakups are often not regulators' first choice. They typically have come to the decision to require divestiture only after lengthy efforts to impose operating rules and constraints on these companies have failed. This was the case with the AT&T and other telecom breakups, where divestiture was pursued when the regulator could not or would not act, as well as with the countless divestitures of electric power companies, where mandatory access and tariff policies were tried and ultimately failed.

And finally, we note that breakups initiated by firms themselves, including in the tech sector, are quite common. While the motivation for these is companies' own interests rather than regulatory or antitrust imperatives, our point is that experiences such as eBay/PayPal, Pfizer, GE, HP, and a great many others establish the feasibility of successful corporate separation.

III. THE RULES-AND-REMEDIES ALTERNATIVE

The above experiences underscore the frequency and success of structural separation. Also relevant are the failures of the alternative rules-and-remedies approach toward dominant firms. Rules and remedies have a poor record since they are fundamentally an effort to make the company act against its own interest in maximizing profit by instructing it to avoid certain actions that would raise its rivals' costs, deny rivals competitive opportunities, or otherwise unfairly disadvantage them.

But no written order or instruction alters the firm's incentive to engage in these actions, and so the firm will predictably make every effort to avoid or evade the constraint it faces. Where that order affects an operation or transaction of greater value to the company, it is likely to make a correspondingly greater effort to do so. In addition, the company is well positioned to do so since it has much better information than the regulator about its products, divisions, technology, transactions, customers, and so forth. As a result, it has considerable advantages over the regulator in interpreting and complying with the order in ways that minimize or avoid its impact.

Examples of these difficulties abound. Evasion by interpretation is illustrated in a merger context by the U.S. Justice Department's conduct remedy accompanying its approval of the merger of Ticketmaster and Live Nation in 2010. The order sought to preserve rivals' ability to compete against the merged company by specifying that it must not "condition or threaten to condition the provision of Live Nation Entertainment Events" on whether a venue owner had contracted for ticketing services with a servicer other than Ticketmaster. The company engaged in precisely this conduct, arguing that the language of the order prohibited it only from denying *all* Live Nation events to a venue owner, not just one or several events. Only after a decade of anticompetitive practices was the order finally changed to prevent this.[3]

Evasion by stalling is illustrated in the tech area by one provision in the 2001 Microsoft decree. That provision required the company to license to third parties its communications protocols for connecting servers to desktop computers, and to provide documentation within three years. The company repeatedly claimed it was unable to compile the necessary documentation, either because of its inherent complexity, or because of the large number of other requirements in the order, or because it could not "find[…] and hire[…] competent employees with the necessary experience in and training for these highly specialized tasks." Without a good basis for challenging each excuse, the court repeatedly extended the deadline. The Justice Department eventually declared Microsoft's work "substantially complete" (even though hundreds of unresolved issues remained) six years later and nine years after the initial order.[4]

The EU has been more active with respect to the tech companies but its remedy approach has similarly proven inadequate. In its proceedings against Google Shopping, it acknowledged there might be more than one way to resolve the competitive concern and so, instead of imposing a specific fix, it ordered Google to propose its own method for "treating competing comparison shopping services no less favorably than its own comparison shopping service." Not surprisingly, Google responded with proposals that, many said, worked to its further advantage. One such proposal, for example, would create an auction in which various comparison shopping services (including Google's own) would bid for placement. Rivals complained that having to pay Google to cure its anticompetitive actions was not much of a remedy. Moreover, since Google's payments for its own placement would simply go into a different company account, this was no real disincentive to its continued dominance.

In other instances, the tech companies have sought to evade the imposition of a remedy by promising to adhere to specific standards that would seem to cure the problem. In a number of such cases competition authorities have subsequently discovered either flagrant violations or clever wording to justify violations. In its effort to acquire WhatsApp, for example Facebook promised the EU that it would be impossible to create automated matching between the two companies' user accounts. Evidence emerged that Facebook knew full well that it was possible and two years later began that very process, with a miniscule penalty. Google is now promising the EU that as a condition of its acquisition of Fitbit it will "not use individual/personal Fitbit data for advertising." But this promise could easily be evaded by using a more limited data set to gain insights and then train its algorithm accordingly

In the U.S., Amazon addressed concerns that it was using data on its marketplace sellers to launch its own branded competing products by assuring Congress that it did not use "individual seller data directly to compete" with such businesses. But the company soon had to acknowledge that is uses "aggregated data" from independent sellers in exactly this way, leaving unanswered the question of the meaning of "aggregated."

These examples illustrate key distinctions between a rules-and-remedies approach and structural separation. Most fundamentally, structural separation creates incentives for each entity to maximize its own separate profit, much like in a competitive market, rather than to evade constraints on the ability of the single large firm to maximize profit. Separate and independent companies have sharp and visible boundaries, which firms would be reluctant to cross (as with collusive practices). By contrast, rules and remedies are characterized by blurred lines, compromised incentives, and unobservable actions. As some of our examples have shown, rules and remedies often depend crucially on the specific language of an order, inviting the firm's own interpretation and efforts to explain away potentially problematic conduct. In addition, many troublesome actions are deeply buried in a company and difficult for an adversely affected company to identify and nearly impossible for a competition agency to observe. Algorithms that steer business, misuse of data, and other practices cited in the above cases illustrate these problems.

For all these reasons, it is difficult for a competition agency to monitor and enforce rules and remedies. Competition agencies are not designed to be regulatory institutions with constant oversight. The tech companies have features that make this reactive approach especially unlikely to work. Their production processes — digital technologies — are opaque and therefore not readily observed by an outsider. Their services are malleable — changeable at their discretion — permitting endless ways to circumvent an order or rule. The technology is constantly changing in ways that are difficult to predict but can render existing, static constraints irrelevant. And these firm's incentives to evade or avoid are enormous, measured by the profitability of the affected parts of their businesses.

IV. COMPETITION POLICY IN THE TECH SECTOR

This discussion makes clear that a rules-and-remedies approach toward tech company competition problems is unlikely to be

3 J. Kwoka, "Conduct remedies with 2020 hindsight: Have we learned anything in the past decade?" *CPI Chronicle*, April 2020.

4 A. Gavil & H. First, *The Microsoft Antitrust Cases.* MIT Press, 2014.

satisfactory, and very possibly altogether ineffective.[5] This is important to bear in mind since the major objections to breaking up tech firms are that it may be costly or not work well. But the correct basis for judging the breakup approach is not whether it is costless or perfect, but simply whether it is superior to actual alternative approaches. *In fact, we have run the experiment on the latter, and we know how it comes out.* Tolerance of large firms while attempting to control their specific anticompetitive behavior has not worked. While it is appealing to policymakers since it holds out the promise of "having one's cake and eating it, too," time after time this approach has failed, often predictably and miserably. It is for these reasons that we argue that any competition policy toward the tech sector must include the possibility of breakups — and will not be effective unless it does.

To be clear, we do not advocate breaking up the core platforms of the tech companies, but as we have discussed elsewhere, these companies in fact have identifiable fault lines along which structural separation appears feasible.[6] These fault lines are in two dimensions. The first is based on whether they have resulted from acquisitions or by internal development, the second by whether they constitute plausible substitutes or complements to the core platform (or possibly neither). We would argue that generally speaking business operations that have been acquired are likely to reveal clearer fault lines than those developed internally. We would further argue that businesses that are plausible substitutes for core operations constitute more important candidates for divestiture on competitive grounds. This typology would suggest as candidates for separation, for example, Facebook's Instagram and WhatsApp operations, both because they were the result of acquisition and also because they represent plausible alternatives to Facebook's core social media platform.

Elsewhere we have categorized many more parts of Amazon, Apple, Facebook, Google, and Microsoft into these categories.[7] Here we simply emphasize that a close examination of the companies can reveal some quite visible fault lines along which structural separation is entirely plausible, and that such an exercise should be an important tool of competition policy toward these companies. Indeed, nothing short of that will succeed in the objectives of the House committee report, namely, reducing the market power of these companies by limiting their ability to thwart and distort competition. ■

5 Perhaps worse yet, rules and remedies can give the appearance of agency action, even when they have little prospect of success.

6 Kwoka & Valletti, op. cit.

7 *Ibid*.

THE HOUSE TECH REPORT: AN AMBITIOUS PLAN OR A STARTING POINT FOR INCREMENTAL REFORM?

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I. INTRODUCTION

The long-awaited report on competition in digital markets by the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (the "Report")[2] has now become the focal point of discussion for significant potential antitrust reform in the United States. The legislative conversation about the proper role of antitrust enforcement in the U.S. economy and the most effective ways to address concerns about the state of digital markets is still at an early stage in the United States and stands in contrast to the more concrete legislative initiatives that have emanated from other jurisdictions such as the European Union and Australia. But while the Report, which reflects growing criticisms of the effectiveness of current U.S. antitrust law, sheds little light on the precise contours of the legislative proposals that are expected to follow, it will undoubtedly lead to a robust dialogue in the next Congress. Whether that dialogue results in actual reform remains to be seen. At the very least, the Report's far-reaching proposals provide a broad menu from which Congress may be able to find some common ground.

II. PROPOSED LEGISLATIVE REFORMS

Likening digital markets to regulated industries, the Report recommends that Congress consider a series of broad "market-wide" reforms designed to address what it identifies as harmful conduct and "features of digital markets that tend to tip the market towards concentration."[3]

A. Structural Separations to Address Conflicts of Interest

Perhaps the most divisive of the Report's recommendations are two proposals aimed at addressing potential conflicts of interest that may arise when platforms compete with companies in adjacent markets that rely on them to access users. According to the Report, such conflicts of interest may involve dominant platforms (1) misappropriating the data of competitors that rely on their platforms; (2) using their dominance in one line of business as leverage when negotiating in an unrelated line of business; (3) tying products and services that leads to lock-in for users and minimizes competition; and (4) relying on profits from markets that they dominate to facilitate their entry into other markets.[4]

To address these conflicts of interest, the Report recommends structural separations prohibiting a dominant platform from operating in markets that "place the intermediary in competition with the firms dependent on its infrastructure."[5] This proposed structural separation can take two forms. An "ownership" separation, would require "divestiture and separate ownership of each business." The other would allow a single corporate entity to operate in multiple lines of business but would require "functional" separation of lines of businesses.[6]

The Report touts the administrability of market-wide regulations imposing structural separation requirements as compared to case-by-case enforcement: "By setting rules for the underlying structure of the market—rather than policing anticompetitive conduct on an *ad hoc* basis—structural rules are easier to administer than conduct remedies, which can require close and continuous monitoring."[7] But it does not address in any meaningful way the potentially harmful impact of imposing such blunt restrictions, noting only that some experts have cautioned that implementing structural solutions to address conflicts of interest can be challenging and costly, particularly in dynamic markets. Nor does the Report provide a clear roadmap as to what specific legislative measures might look like and instead merely cites to experts that have suggested looking to business-initiated corporate restructuring and divestitures as a guide to designing and implementing successful break-ups.

B. Nondiscrimination Rules to Guard Against Self-Preferencing

The Report also suggests the imposition of behavioral rules to address concerns that self-preferencing may provide market leaders with an unfair advantage. Where a platform is "the only viable path to market," the Report says, a dominant firm's prioritization of its own products or services, or its preferential treatment of business partners, puts competitors at a significant disadvantage in the marketplace. The Report recommends that Congress impose nondiscrimination rules such as requiring dominant platforms to "offer equal terms for equal service" as regards to both price and access to ensure fair competition and

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2 U.S. House, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets (2020) (hereafter the "Report").

3 *Id.* at 378.

4 *Id.* at 378-79.

5 *Id.* at 379.

6 *Id.* at 380.

7 *Id.* at 381.

promote innovation online.[8] Noting the successful use of non-discrimination rules as applied to network monopolies in the transportation and communications industries, the Report argues that the application to digital markets is a logical next step as technologies evolve.[9]

C. Interoperability and Portability Standards to Facilitate Entry

Barriers to entry in digital markets, such as network effects and switching costs that disproportionately advantage dominant firms, are another set of concerns identified in the Report.[10] As described in the Report, digital platforms that are not interoperable with competing networks impose high switching costs on users, resulting in lock-in that benefits the dominant platform. The Report considers social networks, mobile phone operating systems, and online commerce platforms as particularly susceptible to user lock-in.

To reduce switching costs, the Report recommends that Congress consider developing interoperability and portability standards "to encourage competition by lowering entry barriers for competitors and switching costs for consumers."[11] Noting that interoperability is a core feature of email and other online services, the Report suggests that an interoperability requirement allowing competing platforms to interconnect would minimize network effects, lower switching costs, and mitigate the impact of market power.[12] The Report considers an interoperability requirement to be a complement to vigorous antitrust enforcement efforts, rather than a substitute for them.[13]

Another proposed solution to address high switching costs is data portability, which the authors of the Report see as a means of helping alleviate the costs incurred by users that leave a dominant platform. The Report notes that "consumers experience significant frictions when moving to a new product"[14] which can reinforce a dominant platform's market power. One example is the difficulty of migrating user data from one platform to another, which can result in a user being unwilling to move to a competing platform despite other attractive features offered by the competitor. The Report also endorses tools that would allow consumers and businesses to easily port or rebuild their social graph, profile, or other relevant data on a competing platform."[15]

D. Establishing Presumptions Against Digital Platform Mergers

Many of the Reports' proposed reforms are intended to increase antitrust litigation or make enforcement easier for either the agencies or private plaintiffs. A number of proposals would establish presumptions against certain mergers, putting the burden on defendants to justify their mergers rather than requiring the government to prove a merger may substantially lessen competition. For example, the Report recommends codification of the presumption in *Philadelphia National Bank* that mergers resulting in a significant increase in concentration are unlawful.[16] Legislation codifying the presumption would mitigate the risk that a court would not give due consideration to that presumption in assessing the likely competitive effects of a merger.

With respect to digital platforms, however, the Report goes a step further. It recommends that "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion."[17] Unlike the structural presumption noted above, this presumption would apply to any acquisition by a dominant digital platform, even if the acquisition was in a different market or did not otherwise increase concentration. And it is unclear how the presumption could be overcome: how would a platform show the

8 *Id.*

9 *Id.* at 382-83.

10 *Id.* at 384.

11 *Id.*

12 *Id.* at 385.

13 *Id.* at 386.

14 *Id.*

15 *Id.*

16 *Id.* at 392; see also *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 346 (1963) (holding that a merger that will significantly increase concentration in the relevant market should be found presumptively unlawful). Such a presumption is also reflected in the DOJ and FTC 2010 Horizontal Merger Guidelines. See Horiz. Merger Guidelines, Section 5.3. Although the agencies have had success advocating that courts should follow the Guidelines as persuasive authority, by their terms the Guidelines set forth the agencies' approach to analyzing mergers rather than the standard applicable to courts.

17 Report at 388.

transaction was "necessary" to serve the public interest? How would a platform show that it could not achieve similar benefits through internal growth and expansion? Does the platform have to show it could not achieve such benefits at all, or only that such internal growth and expansion would be prohibitively expensive or time consuming? Moreover, why couldn't a platform overcome the presumption simply by showing that the acquisition is not likely to substantially reduce competition?

The Report would also codify "a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets."[18] The Report would clarify that the agencies would not have to prove that "the potential or nascent competitor would have been a successful entrant in a but-for world."[19] But the Report leaves unstated what a defendant could show to overcome this presumption.

E. Increased U.S. Agency Enforcement

In addition to these proposed legislative changes, the Report suggests that the current laws have not been adequately enforced. The Report proposes two categories of solutions to this problem beyond the modifications discussed above.

First, the Report claims that Congress has not played an active enough role in ensuring that the antitrust laws are robustly enforced. The Report criticizes Congress for "deferring largely to the courts and to the antitrust agencies in the crafting of substantive antitrust policy" over the last several decades.[20] This abdication, according to the Report, has been interpreted by the courts as "acquiescence to the narrowing of the antitrust laws" which has had the unintended consequence of making antitrust "overly technical and primarily dependent on economics."[21] To remedy these shortcomings, the Report recommends that Congress "revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its commitment to ongoing market investigations and legislative activity."[22] In addition to proposed legislation, we are likely to see more Congressional investigations and hearings on competition issues as well as more public pressure on the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") to bring more enforcement actions. Congressional fact-finding could also pave the way for more private enforcement actions.

Second, the Report alleges that "the antitrust agencies consistently failed to block monopolists from establishing or maintaining their dominance through anticompetitive conduct or acquisitions."[23] More pointedly, the Report claims that the FTC and DOJ have "constrained their own authorities and advanced narrow readings of the law" for decades.[24] The Report complains that the DOJ and FTC have "chosen to stop enforcing certain antitrust laws entirely" such as the Robinson-Patman Act.[25] To fix this, the Report suggests increasing the agencies' budgets to give them the resources they need for vigorous enforcement. Moreover, it recommends significant new responsibilities for the agencies, such as a requirement that they solicit *and respond to* public comments on merger reviews as well as provide written explanations of all enforcement decisions; a requirement that the FTC regularly collect data and report on concentration in various sectors of the economy; and mandated "merger retrospectives on significant transactions consummated over the last three decades." The Report would also create "stricter prohibitions on the revolving door between the agencies and the companies that they investigate."[26]

Finally, the Report also complains that the FTC "has been reluctant to use the expansive set of tools with which Congress provided it," noting in particular the use of Section 5 as a standalone antitrust statute and the fact that the FTC has not used its rulemaking authority to promote competition.[27] The Report states that the agency has brought only one case under its Section 5 authority — its case against Qualcomm — but ignores that the Commission has resolved other Section 5 cases, such as those relating to invitations to collude — with consent de-

18 *Id.* at 394.

19 *Id.*

20 *Id.* at 400.

21 *Id.*

22 *Id.*

23 *Id.* at 401.

24 *Id.*

25 *Id.* at 402.

26 *Id.* at 403.

27 Report at 401.

crees.[28] And in 2015, the Commission issued a Statement of Enforcement Principles, explaining that the agency was likely to bring Section 5 cases to challenge conduct that harmed competition or the competitive process, but that was not likely to be captured by the Sherman or Clayton Act.[29] Invitations to collude fit that description; exclusionary or anticompetitive conduct by a large firm (even if not a monopolist), for example, could fit that description as well. The FTC certainly could bring such cases to expand and define its Section 5 authority without further legislation. There is also the possibility that the FTC could engage in rulemaking in the competition arena, as it does pursuant to its consumer protection authority.[30]

F. Litigation Reform to Facilitate Private Antitrust Enforcement

The Report also seeks to enhance or expand private antitrust enforcement, generally by overriding certain Supreme Court precedents imposing prudential limits on antitrust actions. Given the well-accepted and long-standing nature of many of the Supreme Court decisions at issue, it seems unlikely those decisions could be overturned or otherwise limited without legislation. But the likelihood of such legislation seems particularly unclear, given how little the Report says about any problems caused by those decisions. Indeed, while it appears that the authors of the Report believe certain Supreme Court decisions have impeded useful private actions, they generally do not say why or how or how much.

And it is hard to understand why certain proposed reforms are in the public interest. For example, the Report recommends eliminating "court-created standards for 'antitrust injury' and 'antitrust standing,'" citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977) and *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). The Report says those decisions "undermine" Congress' granting of a private right of action to anyone injured "by reason of anything forbidden in the antitrust laws."[31] But the antitrust injury requirement separates those who were injured by a reduction in competition from those who were not. Thus, in *Brunswick*, a group of small bowling alleys challenged Brunswick's acquisition of certain failing bowling alleys.[32] By buying the failing bowling alleys, Brunswick increased competition, lowering prices and giving consumers an additional choice for where to go bowling. Thus, the acquisition was pro-competitive — but it harmed plaintiffs, who would earn higher profits if the failing bowling alleys simply went out of business.[33] The Supreme Court rejected the plaintiffs' antitrust claim, finding that any injury was not caused by an unlawful reduction in competition — i.e. something "forbidden in the antitrust laws" — and thus was not injury of the sort contemplated by the statute.[34] Thus, while overturning *Brunswick* may well increase private antitrust litigation, It is unclear that doing so would increase any type of private litigation that would benefit consumers.

Similarly, *Associated General Contractors* imposes limits on standing based on common law principles of remoteness, proximate cause, and directness of injury that apply throughout our jurisprudence.[35] Thus, plaintiffs challenging an alleged conspiracy to fix the price of eggs, for example, might include wholesalers or retailers who bought eggs directly from the allegedly conspiring producers. State antitrust laws might allow claims by consumers who bought eggs from a grocery store. But standing limitations might block a consumer who bought an omelet at a restaurant, a consumer who bought a cake from a bakery, or a company that produces egg cartons and sees its sales decline. Again, it is unclear why standing principles that apply throughout our common law to maximize claims brought by the most aggrieved plaintiffs, while avoiding duplicative recoveries, difficulties of proving or apportioning damages, and over-clogging courts, should not apply to antitrust. Nor does the Report explain how such basic standing principles reduce any private antitrust enforcement that we, as a society, would want to encourage.

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28 See, e.g. *Decision and Order, In the Matter of Fortiline, LLC, Dkt.* No. C-4592 (Sept. 23, 2016); *Decision and Order, In the Matter of Drug Testing Compliance Group, LLC,* Dkt. No. C-4565 (Jan. 21, 2016); *and Decision and Order, In the Matter of Motorola Mobility LLC and Google Inc.,* Dkt. No. C-4410 (July 23, 2013).

29 Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, April 13, 2015.

30 See *Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020); Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory, 38 Antitrust Bull. 143, 207 (1993).

31 *Id.* at 404.

32 See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477.

33 *Id.* at 477.

34 *Id.* at 488.

35 See *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519.

The Report also calls for "eliminating . . . undue limits on class action formation," citing *Comcast v. Behrend*, 569 U.S. 27 (2013).[36] But again, the Report does not explain the basis for its concern. In *Comcast*, the plaintiffs proposed a damages model that calculated aggregate damages from four different theories of harm.[37] The court, however, found that only one theory of harm was susceptible of class wide proof sufficient to support a class action.[38] Because the model could not distinguish between, or disaggregate, damages based on one theory of harm from another, plaintiffs were unable to prove damages with common evidence, and a class could not be certified.[39] Again, the Report does not say that *Comcast* was wrongly decided, or explain how *Comcast* unduly limits class actions. Is it that plaintiffs should be able to support class certification without showing that they can prove their claims with predominantly common evidence? The Report does not say.

The Report also calls for "[l]owering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*."[40] But Twombly did not impose a "heightened" pleading standard for antitrust cases.[41] It merely clarified that Rule 8 of the Federal Rules of Civil Procedure requires enough factual pleading to show that the plaintiff had a plausible claim.[42] The Report does not provide evidence that *Twombly* has prevented the filing of credible antitrust claims or otherwise hampered private enforcement that ought to be encouraged. Presumably, the Report does not seek to increase implausible or meritless antitrust claims. And the Supreme Court has clarified that the Twombly pleading standard applies to all claims in federal court, not just antitrust claims.[43] It is unclear if the Report advocates a lower pleading standard for antitrust claims as compared to other claims, and if so, why.

While most of the recommended reforms would require legislation, a few would not. For example, among the "Additional Measures to Strengthen the Antitrust Laws" identified by the Report is a call to override *United States v. Sabre Corp*., 452 F. Supp.3d 97 (D. Del. 2020) to clarify "that platforms that are 'two-sided,' or serve multiple sets of customers, can compete with firms that are 'one-sided.'"[44] But the Third Circuit has already vacated that decision.[45]

Similarly, the House Report calls for "Rehabilat[ing] Monopolization Law" by, among other things, "clarifying" tying law — but tying by a dominant firm is already a basis for a monopolization claim, as the Report acknowledges.[46] To the extent any clarification is actually needed, it is unclear why the agencies could not bring cases to seek this clarity.

III. WHAT'S NEXT?

What then is the likelihood of Congress passing legislation that addresses the Report's concerns about competition in digital markets? A separate report issued by Republican House member Ken Buck provides a glimpse into the areas that may form the basis for bipartisan legislative proposals.[47]

The Buck Report suggests potential bipartisan support for legislative recommendations "empowering consumers to take control of their data through data portability and interoperability standards" and shifting the burden of proof for companies pursuing mergers and acquisitions.[48] However, other proposals are viewed as "non-starters."[49] For example, there is unlikely to be bipartisan consensus with respect to structural separations and nondiscrimination rules.[50] Rep. Buck instead advocates that the subcommittee "evaluate tailored and targeted proposals to

36 Report at 404.

37 *Comcast v. Behrend,* 569 U.S. 27, 31.

38 *Id.* at 28.

39 *Id.* at 35

40 Report at 404, citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007).

41 *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547.

42 *Id.* at 556.

43 *Ashcroft v. Iqbal,* 556 U.S. 662, 684 (2009).

44 Report at 399.

45 See *United States v. Sabre Corp.,* No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

46 Report at 398.

47 See *U.S. House., Rep. Ken Buck,* The Third Way (hereafter the "Buck Report").

48 Buck Report at 5.

49 *Id.* at 16.

50 *Id.*

ensure Big Tech firms are not using their market-dominant positions to crush competition in other lines of business."[51] The Buck Report also takes issue with the notion of a broad regulatory regime" to prevent platforms from self-preferencing, arguing that such regulation "will only serve to crush innovation and stymie the creative market."[52] Finally, Rep. Buck rejects recommendations to change pleading standards and prohibit arbitration clauses in contracts that the majority considers to be barriers to private antitrust enforcement, instead advocating that the subcommittee focus on legislation that removes barriers to agency antitrust enforcement rather than private enforcement.[53]

It may be, then, that rather than ushering in major antitrust reform in the United States, the Report provides a starting point for more modest, incremental changes to U.S. antitrust law. ■

51 *Id.*

52 *Id.* at 17.

53 *Id.* at 17-18.

ANTITRUST 2020 AND THE HOUSE MONOPOLY REPORT: HOW DO YOU FIX THIS HOT, COLOSSAL MESS, AND WHO'S GOING TO DO IT?

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I. INTRODUCTION

The House Democrats' big-tech monopoly report[2] was several things. Measured by length and detail, the Report was above all a fact-finding exercise. Its vast majority — upwards of four hundred pages and more than 2,400 footnotes — consists of very long, meticulous analyses of the conduct of four particular firms. It reads more or less like a complaint in litigation, and indeed, the pending government lawsuits against Google[3] and Facebook[4] both track it closely. In some respects, the fact-finding work is loose and lacks rigor, for what that may be worth. For my money that includes its routine, unelaborated conclusions that particular firms have market power in particular areas, and its essentially undefended claim that "Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company's history."[5]

But put that aside, because the Report does so much else that is important. It was the first American government document to clearly explain some of the most important theoretical ideas in the pending government cases, like why Google in fact has probably an unassailable position in search because of the cost of building an alternative "index" of web pages,[6] or that Facebook's acquisitions of Instagram and WhatsApp were so dangerous precisely because they weren't horizontal.[7] To a striking degree the suits and the report even emphasize the same specific emails, communications, and particular evidence. While I guess I don't know and I couldn't really confirm from press accounts, Congress's investigation was not formally coordinated with the work of the agencies. One imagines the subcommittee's quite progressive majority and their staff are not in close cooperation with the Trump antitrust leadership. The agencies apparently did plenty of their own work, and the Facebook cases in particular follow a § 6 informational investigation by the Federal Trade Commission[8] that presumably turned up much of that case's deep, meticulous detail. So who really knows who discovered what, but the House subcommittee and its small staff's review of 1.3 million documents and days of testimony and interviews with dozens or hundreds of witnesses was a substantial feat and public service, and it was presented with important conceptual reasoning about competitive effects and motivations. One imagines the agencies read the Report and benefitted substantially from it.[9]

This seems to me socially indispensable work, if nothing else in that the Report laid the foundation for popular legitimacy of new ideas of liability. Just as the suit against Microsoft struck many as crazy until the government secured a resounding victory on the merits before the *en banc* D.C. Circuit, today's claims against the online platforms will benefit from this foundation-building. Consider how crazy the FTC's investigation of Google seemed to many Americans in 2012 and 2013. "Search?," people said, "You think they monopolized search? It's free!" But that was then and this is now, and a well-publicized, 18-month congressional investigation may well have helped to establish the plausibility of challenge to online dominance.

By contrast, as a reform proposal, the House report is much more limited and tentative. That's perhaps a surprise, since Congress exists to legislate, and celebrated committee investigations of the past have often generated specific legislative proposals. But in any case, the nearly four hundred-page factual monograph is followed by a reform policy discussion of about 25 pages that merely describes a collection of ideas in very general terms. Only one is at

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2 Subcomm. on Antitrust, Commercial, and Administrative Law, Comm. on the Jud., U.S. House of Reps., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 152 (2020) [hereinafter "House Report"].

3 United States v. Google, LLC, (D.D.C. Oct. 20, 2020) (complaint), available at https://assets.documentcloud.org/documents/7273457/10-20-20-US-v-Google-Complaint.pdf [hereinafter "Google Complaint"].

4 On December 9, 2020, the Federal Trade Commission and a coalition consisting of nearly every U.S. state sued Facebook, filing complaints that were separate but tracked very closely in allegations, theories of liability, and prayers for relief. See *FTC v. Facebook, Inc.*, (D.D.C. Dec. 9, 2020) (complaint), available at https://www.ftc.gov/system/files/documents/cases/1910134fbcomplaint.pdf [hereinafter "FTC Facebook Complaint"]; *New York v. Facebook, Inc.*, (D.D.C. Dec. 9, 2020) (complaint), available at https://ag.ny.gov/sites/default/files/facebook_complaint_12.9.2020.pdf.

5 House Report, *supra* note 2, at 299.

6 *Compare* House Report, *supra* note2, at 79-80, with Google Complaint, *supra* note 3, at ¶¶ 22, 94.

7 *Compare* House Report, *supra* note 2, at 144-45, with FTC Facebook Complaint, *supra* note 4, at ¶ 14.

8 FTC, *Press Release: FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), available at https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

9 The House Report was made public first, on October 6, 2020. The federal Google case was filed on October 20 and the Facebook cases were both filed December 9. Subsequent state cases against Google were filed on December 16 and 17. Colorado v. Google, LLC, (D.D.C. Dec. 17, 2020), available at https://beta.documentcloud.org/documents/20431671-colorado-v-google; Texas v. Google, LLC (E.D. Tex. Dec. 16, 2020), available at https://www.courtlistener.com/recap/gov.uscourts.txed.202878/gov.uscourts.txed.202878.1.0.pdf.

all specific, an antitrust exemption for newspapers already introduced in 2019 by subcommittee Chair David Cicilline.[10] Less surprising is that the proposals bear a family resemblance to the long, striking draft bill circulated by Senator Elizabeth Warren in late 2019 (of which Congressman Cicilline was reportedly a tentative co-sponsor). That bill comprised twenty-four single-spaced pages setting out a barrage of ideas many of which would be historic and consequential.[11] That similarity seems less surprising because the activists who seem mainly to have influenced Senator Warren's antitrust work, associated with the Open Markets Institute and similar groups, were pretty well represented among the Subcommittee's staff and the witnesses who assisted it. To be clear, this new House Report is only a distant echo of the Warren bill. For one thing, the Report's reform discussion is breezy and abstract, whereas the Warren bill was dense, hyperdetailed, and complex. The report also pulls a lot of punches, as when it (mostly) avoids the Warren bill's full-frontal attack on the "consumer welfare" standard.[12] The Warren bill, for its part, was as quixotic and unapologetic as Leroy Jenkins,[13] giving exceptional new powers to the Federal Trade Commission,[14] banning a substantially expanded range of group boycotts,[15] finding § 2 market power on very loose anecdotal evidence,[16] and presumptively outlawing *all* exclusive dealing or refusal to deal by *any* firm with 40 percent of sales or 25 percent buyer market share.[17]

What the report nevertheless shares with the Warren bill, and with the progressive antitrust project, is a mood, and an approach. Most of its ideas evoke a nostalgia for a kind of regulatory policy we mostly don't have any more. It is fairly striking to read a report prepared for the Congress of 2021 that begins selling its ideas by highlighting the Hepburn bill, a railroad rate-regulation law of 1906, and the Bank Holding Company Act of 1956.[18] Some of its proposals would conventionally be called "antitrust" ideas, but quite a lot of them would not. To be clear, that is no criticism in itself. It makes perfect sense to me and maybe it's essential to use other policies and other approaches to bolster the essentially tort-style law-enforcement regime of our antitrust. What now usually goes by the name "antitrust" mostly waits for business to do its thing, and asks after the fact if the conduct was consistent with rules meant to protect market institutions. Situations seem routine in which rules like that alone are not enough. I also don't mean to say that the Report *rejects* received antitrust, in any overall fashion. A fair number of its proposals just call for reinstating Warren-era doctrinal standards, like a call to strengthen and codify the *Philadelphia National Bank* presumption,[19] or to fund the law again with appropriate agency budgets.

But in dwelling on many of its ideas, the Report betrays a dissatisfaction with the broader picture of American economic policy, in a way that may seem subtle and muted but is also fundamental. It includes proposals for prospective line-of-business limits and prohibition of some vertical integrations. In its implicit economic theory, it displays a preoccupation with discrimination and "conflicts of interest," and thus a desire for government oversight of "fairness." It includes a reconceptualization of monopolization law to reach what the Report calls "abuse of dominance," seeming to invoke European monopolization law, but describing it in ways more like the "abuse of superior bargaining position" controlled under national laws in a few Asian and European countries. That is, it envisions rules under which courts or regulators would police bilateral price negotiations to prevent exercises of market power, apparently however gotten.[20] Chairman Cicilline's newspaper exemption is literally the opposite of "antitrust," as it authorizes conduct that would otherwise violate the law, and it implies a model of countervailing power as a solution

10 House Report, *supra* note 2 at 390 (discussing the Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong., 1st Sess. (2019)).

11 Anti-Monopoly and Competition Restoration Act, Draft Copy of SIL19C37 (Dec. 2019), available at https://www.hausfeld.com/uploads/documents/2019_12_02_Warren_draft_antitrust_bill.pdf [hereinafter "Warren Bill"].

12 See Warren Bill, *supra* note 11, at §§ 2(a)(11)-(12); 2(b). But see House Report, *supra* note 2 at 393.

13 *Cf.* https://www.youtube.com/watch?v=mLyOj_QD4a4.

14 Warren Bill, *supra* note 11, at §§ 4(c)(2) (requiring FTC administrative approval — not just review — for all mergers over certain size); 7(c) (requiring FTC to promulgate substantive conduct rules interpreting Sherman Act §§ 1 and 2); 7(e)(2) (requiring judicial deference to any reasonable market definition, market share, or anticompetitive conduct even *alleged* by the Commission in an "enforcement action").

15 *Id.* at § 5(b)

16 *Id.* at § 6(a).

17 *Id*. at § 6(a).

18 House Report, *supra* note 2 at 381-82.

19 *Id*. at 395.

20 See *id*. at 391, 397. On abuse of superior bargaining position, see generally Thomas K. Cheng, *Sherman vs. Goliath?: Tackling the Conglomerate Dominance Problem in Emerging and Small Economies-Hong Kong As A Case Study,* 37 Nw. J. Intl. L. & Bus. 35, 81-83 (2016); Albert A. Foer, Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners? (AAI Working Paper No. 16-02, Sept. 29, 2016), available at https://perma.cc/37U7-DNHW.

to monopoly, rather than just breaking up the monopoly itself. Of course, none of these ideas is foreign to American law and several of them were parts of the law during the twentieth century. What seems notable is the degree to which they reflect what is subtly, implicitly, basically a critique of unregulated capitalism.

I guess a chief reason I stress this aspect of the Report's nature is just to consider how unlikely any of it is to become American law in the near- or middle-term. The odds against it are spectacular. America enters 2021, the 117th Congress, and the 46th Presidency with dysfunctional institutions and a divided people, about half of whom apparently remain very conservative. The legislature is barely able to enact minimal funding measures, and in what appears now to be our long-term cycle, meaningful legislation occurs only during those infrequent periods when one party has the White House and both chambers of Congress. Even in the apparently unlikely event that Democrats win both Senate run-off elections in Georgia, and therefore that we have one of those two-year periods during the 117th Congress, antitrust will presumably appear on an agenda behind many other very pressing matters. And while we flatter ourselves that there is some bipartisanship in the new concern for American monopoly, nearly half of the subcommittee itself joined a dissenting statement with very different preoccupations. While it may or may not be thoroughly crazy-pants in its allegations of an anti-conservative pogrom, the minority statement betrays a legislature half of which is given to gadfly political distractions with no interest in serious policy, least of all any policy even slightly disagreeable to business or calling on government for any act other than to shrink it, hobble it, and call it ridiculous. And indeed even most Democrats in Congress are probably too moderate to support many of the Report's proposals. Its ideas may be less ambitious than the Warren bill, but they are still far more ambitious than typical Democratic antitrust proposals. Consider the congressional Democrats' "Better Deal" platform of 2018,[21] as partly implemented in a set of bills submitted by Sen. Klobuchar during the past few years,[22] or in other miscellaneous proposals over time, like the § 2 civil penalty authority proposed by Sens. Klobuchar & Blumenthal.[23] I thought many of those ideas were fine, but they were not fundamental and would only fine-tune an existing model. None of those dynamics within Congress seem likely to change very much, as our legislators maintain extremely high incumbency rates despite remaining routinely less popular than colonoscopies, communism, and head lice.[24]

One other thing seems clear after an election in which more people voted for Donald Trump than for any other presidential candidate in history except Joe Biden: public opinion is more conservative than many might like to have believed, and much more susceptible to influence by the business-friendly, anti-government news media of the right. It's just awfully hard to imagine the U.S. Congress enacting anything resembling most of the proposals in the Report, any time for a generation or more.

But that leaves, finally, one other thing that the Report undoubtedly was. Just as with its work in establishing a baseline of legitimacy for lawsuits like *United States v. Google* and *FTC v. Facebook,* this Report of a very official U.S. institution may someday seem like a first, an important step in some serious reform. Though radical and quixotic it may sometimes seem, there is probably something to be said for just saying things, like they're not crazy, so that other people might consider them possible as well. The Report may therefore represent early, agenda-setting groundwork for later reform. It joins in the building international consensus not only that digital competition is a problem, but even what specific conduct is of concern, and what evidence proves it, joining other closely watched government investigations in Australia, Britain, France, Germany, and the European Commission.

And if I am at all hopeful for that, or even seriously entertain that amendment to statutory antitrust could be a good idea, that is just a sign how dire things have become. Even five or ten years ago, I would have said that meddling in the text of the Sherman or Clayton Acts, by the venal, distracted, and often seemingly incompetent Congress by which we are governed, would be a serious mistake. Since then, having read decision after maddening decision by a judiciary that seems to find it impossible to imagine an antitrust plaintiff ever winning, "[t]he sole consistency" in antitrust has come to seem "that . . . the Government always [loses]."[25] At this point in history, laying some sort of groundwork for legislation is the only hope left. ■

21 Democrats in Congress announced a loose collection of economic reforms in July, 2017, as part of an electoral platform for the midterm elections of 2018, and it included several antitrust suggestions. They touched to some degree on progressive values like those in the Report, but generally dwelt on corrections to run-of-the-mill antitrust doctrine. See generally Chris Sagers, *Trustbusters: The One Economic Proposal In The Democratic "Better Deal" Platform That Could Actually Change The World,* Slate, July 27, 2017, available at https://slate.com/news-and-politics/2017/07/the-one-proposal-in-the-democratic-better-deal-platform-that-could-actually-change-the-world.html.

22 Consolidation Prevention and Competition Promotion Act, S. 307, 116th Cong., 1st Sess. (2019) (also introduced as S. 1812, 115th Cong., 1st Sess. (2017)); Merger Enforcement Improvement Act, S. 306, 116th Cong., 1st Sess. (2019) (also introduced as S. 1811, 115th Cong., 1st Sess. (2017)).

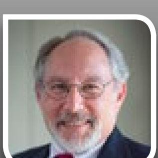
23 Monopolization Deterrence Act, S. 2237, 116th Cong., 1st Sess. (2019).

24 Public Policy Polling, *Press Release: Congress Less Popular Than Cockroaches, Traffic Jams* (Jan. 8, 2013), available at https://www.publicpolicypolling.com/wp-content/uploads/2017/09/PPP_Release_Natl_010813_.pdf.

25 *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

ANTITRUST IS POISED FOR CHANGE: HOW FAR WILL IT GO?

BY ANDREW I. GAVIL & ANGEL PRADO[1]



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I. INTRODUCTION

On October 6, 2020, the majority staff of the U.S. House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, released a long-anticipated report on the state of competition in digital markets ("Staff Report").[2] The 450-page Staff Report is the capstone of a year-plus investigation of some of the largest online companies and the effectiveness of current antitrust law and enforcement. As had been expected, the Staff Report argues that there is inadequate competition and antitrust enforcement in the "digital economy," and recommends an array of proposals directed at the investigation's most prominent targets, as well as the broader economy. If adopted, those reforms would arguably effectuate the most significant overhaul of antitrust law and enforcement in decades, not just in digital markets but potentially across all industries.

In response to the Staff Report, a group of Republican members of the House Judiciary Committee issued their own report, *The Third Way: Antitrust Enforcement in Big Tech* ("Third Way Report"),[3] which supports a far more limited set of reforms and takes issue with most of the majority staff's proposals. Going forward, the Third Way Report's proposals may provide a starting point for bipartisan reforms.

But these two reports do not stand alone in the debate over the future course of antitrust. Most recently, The Washington Center for Equitable Growth released its own competition report in November ("Equitable Growth Report").[4] Co-authored by a group of prominent academics and former government antitrust officials, the Equitable Growth Report also expresses concern for the state of competition, emphasizing the view that market power is a growing concern in the economy. In response, it offers its own recommendations for "restoring competition" to the incoming Biden administration. The also recent and extensive Report on the Digital Economy released by the Global Antitrust Institute provides a collection of much different views on the state of antitrust law, defending it from today's critics and cautioning against major reforms.[5] Collectively, these reports are among the most recent, leading policy proposals analyzing the increasingly tech-influenced global economy.

This article focuses primarily on the Staff Report and Third Way Report, summarizing and analyzing their recommendations. It concludes by considering the prospects for enforcement and legislative reforms.

II. STAFF REPORT RECOMMENDATIONS

After surmising that there is a lack of competition in the "digital economy," the Staff Report makes recommendations in two broad categories: (1) proposals to "restore competition" in digital markets and (2) proposals that it thinks would strengthen antitrust law and enforcement generally.

A. Proposals Directed at the "Digital Economy"

1. Structural Separation and Line of Business Restrictions

According to the Staff Report, the major online platforms are integrated across different lines of business, which creates what it describes as "conflicts of interest" when they compete with rivals that depend on the platform for access to users. For example, the majority staff concludes that this kind of integration, a common practice in other industries that engage in dual distribution or, for example, offer house brands for sale alongside competing brands, leads to the misappropriation of data to harm rivals; using market power in one business line as leverage in negotiations in a second business line; tying products and services to lock in users and insulate the platform from competition; and using supra-competitive profits from one business line to subsidize other business lines.

The Staff Report recommends legislation requiring (1) structural separations (prohibiting a platform from operating in markets where that platform competes with firms dependent on it, either through ownership separation and divestitures, or corporate-structure restrictions) and (2) limiting the markets in which a platform can engage.

2. Prohibition on Self-Preferencing or Discriminatory Treatment

The Staff Report further asserts that some platforms are "dominant," and that they have engaged in "self-preferential" or "discriminatory" treatment to benefit their own products and services. Such conduct, it maintains, has allowed them to pick winners and losers in the marketplace, and has allegedly dis-

2 Available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

3 Available at https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

4 Available at https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf.

5 Available at https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf.

torted competition making it difficult for rivals to expand, even with highly popular products, leading to less innovation.

The majority staff recommends that Congress establish non-discrimination rules that would prohibit "dominant platforms" from engaging in discriminatory treatment and require them to offer equal terms, including price and access, for equal service. The majority staff points out that nondiscrimination requirements have been applied to other network industries, such as those found in the 1887 Interstate Commerce Act (prohibiting discriminatory treatment by railroads) and the Federal Communications Commission's 2015 Open Internet Order (prohibiting internet service providers from discriminating among content providers). Those Acts, however, are associated with elaborate regulatory schemes that apply to discrete and more easily defined industries. It remains to be seen whether they provide useful analogies for "dominant platforms" in "digital markets," terms that would need to be more clearly defined.

3. Interoperability and Data Portability

The Staff Report asserts that digital markets have traits that make them prone to tipping in favor of a single dominant firm or platform, including network effects, switching costs, and other presumed entry barriers. For example, it finds that because platforms may not be interoperable with other platforms, users and sellers on a platform may face very high switching costs, leading to lock-in on the dominant platform. Importantly, the Staff Report does not sufficiently acknowledge that the business models of the firms studied are not uniform, and that these well-understood market characteristics can, and often do, vary from firm to firm and from industry to industry.

The Staff Report nevertheless recommends legislation facilitating (1) data interoperability, which would allow competing platforms to interconnect with dominant platforms, and (2) data portability, which would allow users and businesses to port their social graph, profile, or other relevant data among competing platforms. The majority staff finds that the effect of these changes would be to lower entry barriers for competitors and switching costs for consumers. A September 2020 Federal Trade Commission Workshop on Data Portability revealed, however, that there are competing policy concerns and widely differing views of the competitive utility, feasibility, and administrability of mandated interoperability and data portability regimes.[6]

4. Prohibition on Abuse of Superior Bargaining Power

The Staff Report concludes that dominant platforms enjoy and abuse "superior bargaining power" over third parties that depend on the platforms to access users and markets. These platforms allegedly use that bargaining advantage to extract more money, more data, or better terms than parties would be willing to provide in a more competitive market.

The majority staff recommends that Congress prohibit "the abuse of superior bargaining power" by targeting anticompetitive contracts and introducing due process protections for individuals and businesses dependent on dominant platforms. However, the Staff Report does not indicate what constitutes superior bargaining power, anticompetitive contracts, or dependency on dominant platforms, all terms that would need to be clarified.

5. Merger Reform

The Staff Report alleges that the largest platforms owe part of their dominance to acquisitions that either helped to build their market positions directly or neutralized perceived competitive threats. In response, the majority staff recommends two of its most significant proposals:

- Requiring "dominant" platforms to report all transactions to the antitrust agencies, regardless of whether the Hart-Scott-Rodino Act ("HSR") thresholds are met, and eliminating the HSR deadlines for agency pre-merger reviews to give the antitrust agencies more time to conduct reviews.

- Shifting the burden of proof to the merging parties in transactions involving dominant platforms by creating a presumption of competitive harm unless the parties can show (a) that the merger would benefit the public interest, and (b) that similar benefits could not be achieved through internal growth and expansion.

It is unclear what factors would be relevant to, and how merging firms would satisfy, the proposed "public interest" standard. If interpreted broadly, it could redirect merger analysis away from today's consumer welfare focus by inviting wide-ranging "defenses" that could prove difficult for courts to evaluate on a case-by-case basis. It might also have the unanticipated consequence of inviting mergers that would clearly violate today's standards if the merging firms are able to assert and support a broader "public interest" benefit to some group of stakeholders.

B. Broader Proposals for Reforms of Antitrust Law and Enforcement

Although the bulk of the Staff Report focuses on the majority staff's evaluation of four particular firms (Facebook, Google,

6 Data To Go: An FTC Workshop on Data Portability | Federal Trade Commission.

Amazon, and Apple), its recommendations range far beyond them, posing the obvious question of whether the record assembled by the Subcommittee supports broader economy-wide reforms. The most substantial reforms are directed at monopolization and mergers.

1. Monopolization Law

The Staff Report contends that the courts have significantly weakened the antitrust laws and made it harder for antitrust enforcers and private plaintiffs to bring successful lawsuits.[7] According to the Staff Report, courts have significantly heightened the legal standards that plaintiffs must overcome to prove monopolization under Section 2 of the Sherman Act and the Supreme Court, in particular, has imposed unwarranted requirements to prove violations of Section 2. The Staff Report recommends:

- *Abuse of Dominance*. That the Sherman Act be amended to prohibit "abuse of dominance," the formulation that has been used in the European Union, and to create statutory presumptions that a market share of 30% or more constitutes a rebuttable presumption of a seller's dominance, and a share of 25% or more constitutes a rebuttable presumption of a buyer's dominance. Such a change could significantly expand the reach of current U.S. antitrust law.

- *Monopoly Leveraging*. Overriding case law that requires a "dangerous probability" of actual monopolization of a second market to prove what has been labelled "monopoly leveraging." The Staff Report identifies instances where entities purportedly used monopoly power in one market to advantage their position in a second market, which allegedly injured competition, even if the conduct did not monopolize or pose a dangerous probability of monopolizing the second market. The recommendation would legislatively overrule *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

- *Predatory Pricing*. That the law of predatory pricing, which, since 1986, has required proof of both below-cost pricing and the predator's ability to recoup its losses, should be altered so proof of recoupment is no longer required to establish either predatory pricing or predatory buying. According to the majority staff, predatory pricing is a particular risk in digital markets, where winner-take-all dynamics incentivize the pursuit of growth over profits. The change would legislatively overrule *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

- *Essential Facilities and Refusals to Deal*. The Staff Report laments the Supreme Court's abandonment of what had sometimes been labelled the "essential facilities" doctrine, a variety of refusals to deal, arguing that the Supreme Court has made such claims unnecessarily difficult to prove. The Staff Report alleges that it uncovered instances where a dominant platform refused to do business with a third party and concluded that this denial of access adversely affected competition without justification. The majority staff therefore recommends legislatively overruling cases such as *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

- *Tying*. Tying doctrine has a long history in antitrust law that included per se prohibition under certain conditions, but the Supreme Court has not directly addressed it as a variety of exclusionary conduct since the middle 1980s. The Staff Report calls for reforms to establish that "tying" by a dominant firm—where access to a good or service is conditioned on the purchase or use of a separate product or service—is anticompetitive under Section 2 (although it is not clear whether the Majority Staff intends for this to be a rebuttable or irrebuttable presumption). The goal appears to be to revitalize the majority opinion in *Jefferson Parish Hosp. Dist. No. 2. v. Hyde,* 466 U.S. 2 (1984).

- *Self-Preferencing and Anticompetitive Product Design*. That Section 2 is violated when a dominant platform or service makes a design change that excludes competitors or that "otherwise undermines competition," even if the design change is an improvement for consumers. Specifically, the majority staff criticizes the rationale and holding in *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991 (9th Cir. 2010).

- *Other Measures*. In a brief, but significant list of "Additional Measures," the Staff Report identifies other proposals that warrant further review by Congress, including reconsideration of the analysis of two-sided

7 For an additional discussion, see Andrew I. Gavil, "Competitive Edge: Crafting a monopolization law for our time - Equitable Growth" (Mar. 2019).

platform markets in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018) and *United States v. Sabre Corp.*, 452 F. Supp.3d 97 (D. Del. 2020). It also calls for possible action to clarify that market definition is not required to prove an antitrust claim where there is direct proof of market power, and that "false positives" are not costlier than "false negatives."

2. Encouraging Private Antitrust Enforcement

The majority staff emphasizes that private litigation plays a critical role in antitrust enforcement and recommends a number of changes to make it easier for private plaintiffs to successfully pursue antitrust claims. Proposed changes include: eliminating court-created requirements that plaintiffs demonstrate antitrust injury and antitrust standing; reducing procedural obstacles to litigation, including banning forced arbitration clauses and lifting limits on class action certification; and lowering the more demanding pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

3. Merger Enforcement

Although it did not undertake any broader, independent study of merger enforcement, in addition to the reforms directed specifically at digital markets noted above, the Staff Report recommends significant changes to merger standards that would apply to all industries, including:

- *Bright Lines and Structural Presumptions*. The Staff Report recommends that mergers should be deemed presumptively unlawful if they result in an "outsized market share" *or* a "significant increase in concentration." In contrast to current law, this new presumption would shift the burden of *proof*, not merely production, to merging parties to show that the merger "would not reduce competition." Further, efficiencies might not suffice to overcome this presumption. Although the Staff Report purports to find support for its proposal in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), that case required *both* a significant increase in market share *and* a significant increase in concentration, before its "presumption" was triggered. And the *Philadelphia National Bank* presumption shifted only a burden of production and was rebuttable. Relying on a "significant increase in concentration," alone, could expand the scope of Section 7 to preclude many potentially beneficial mergers.

- *Protect Potential and Nascent Competitors*. The topic of potential and nascent competition has received a great deal of attention recently, including from the current Chair of the FTC.[8] The Staff Report recommends revising current law so the antitrust agencies would not have to prove that a potential or nascent competitor would be a successful entrant in a "but-for" world (i.e. absent the acquisition). They would also codify a presumption against dominant firms' acquisitions of startups, even those in an adjacent or related market, and prohibit acquisitions that "may *lessen competition* or tend to increase *market power*," not just acquisitions that "may … *substantially* lessen competition," or "tend to create a *monopoly*" (emphasis added), as current Section 7 of the Clayton Act provides. It is unclear whether such reforms are needed, but, in any event, this discussion of the appropriate standards for assessing the various forms of potential competition will continue, because it involves challenging policy issues and is relevant to both mergers and exclusionary conduct.

- *Strengthen Vertical Merger Doctrine*. Reflecting recommendations that have been advocated by some commentators, the Staff Report invites exploration of the adoption of presumptions against vertical mergers, such as deeming them anticompetitive when either of the merging parties is a "dominant firm operating in a concentrated market," or presumptions relating to input and customer foreclosure. The topic of vertical merger enforcement remains one that has divided commentators and the Federal Trade Commission, as was again on display in the just issued Commentary on Vertical Merger Enforcement.[9] That debate will surely continue in the new Administration.

4. Agency Enforcement

The majority staff accuses the federal enforcement agencies of failing to sufficiently police anticompetitive conduct and mergers. It criticizes the FTC, in particular, for not making greater use of Section 5 of the FTC Act — which prohibits "unfair methods of competition" and, according to the majority staff, was established to serve as a stop-gap measure for all the oth-

8 See generally "Prepared Remarks of Chairman Joseph J. Simons, ABA Section of Antitrust Law Fall Forum 2020" (Nov. 12, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1583022/simons_-_remarks_at_antitrust_law_fall_forum_2020.pdf.

9 See FTC Commentary on Vertical Merger Enforcement (Dec. 22, 2020), available at https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-commentary-vertical-merger-enforcement.

er antitrust statutes. It also faults the FTC for failing to use its competition rulemaking authority, a position that has been strongly advocated by a current FTC Commissioner and his co-author, who served as a Counsel to the Majority Staff.[10]

The Staff Report recommends several reforms, including increasing the budgets of the antitrust agencies, requiring the agencies to solicit and respond to public comments during merger reviews, and requiring the agencies to publish written explanations for their enforcement decisions. On a point that seems to have garnered wide-spread and bipartisan support, the Staff Report also notes that the agencies have been chronically under-funded, and that Congress should enhance its support for their work. But the Staff Report's criticism of the FTC's record of enforcement is at best overstated and fails to credit the agency for cases such as *Qualcomm*, *Surescripts*, and *Vyera*, all of which are currently in litigation.

C. Reactions to the Staff Report

A number of commentators have reacted to the Staff Report, some expressing support whereas others have lodged criticisms of its findings and recommendations. The Staff Report has been praised by advocates of more aggressive antitrust enforcement and more expansive regulation.[11] In contrast, Stanford Law professor and former Justice Department official Douglas Melamed, for example, has called the Staff Report "a political document, not an economic, legal or policy analysis." [12] He criticized the majority staff for failing to consider innocent explanations for the alleged conduct and for ignoring efficiency and economic welfare considerations. Neil Chilson, a former FTC Chief Technologist, notes that it is difficult to find even one business practice that the majority staff considers valuable to consumers.[13]

Some of these criticisms appear justified. For example, the majority staff's failure to specify the breadth of "digital markets," what constitutes a "dominant platform," or what establishes "abuse of monopoly power," tends to obscure the full scope and potential impact of the Staff Report's recommendations. Indeed, some of the majority staff's proposals, such as line of business restrictions, could be harmful to competition and innovation if understood to constitute a wholesale rejection of vertical integration in digital markets. And the Staff Report seems to have been very selective in the record evidence and commentary it relies upon, excluding alternative perspectives and procompetitive justifications, that might have led it to more balanced findings, conclusions, and recommendations.

III. THIRD WAY REPORT RECOMMENDATIONS

Representative Ken Buck (R-CO), with support from three other Republican Representatives, released a response to the Staff Report entitled *The Third Way: Antitrust Enforcement in Big Tech*. Although the "Third Way Report" disagrees with most of the majority staff's major recommendations, it concurs to a degree with the Staff Report's concern about "Big Tech" and supports bipartisan efforts to bring about targeted antitrust reforms.

The Third Way Report identifies several specific areas of agreement with the Staff Report, including:

- Increased resources for the antitrust agencies ("The report makes a good case for the need to strengthen our nation's antitrust agencies with regard to resources. We agree wholeheartedly with this recommendation.");
- Rules for data portability and interoperability ("In a perfect world, consumer-oriented data portability and interoperability policies will further facilitate competition in the marketplace…");
- Shifting the burden of proof to the merging parties in acquisitions involving digital markets ("Congress should consider revising the burdens of proof to ensure our nation's antitrust regulators have the ability to successfully challenge truly anticompetitive mergers…"); and
- Clarifying that market definition is unnecessary if there is direct proof of market power ("The majority's recommendation that market definition is not required if there is direct proof of market power and anticompetitive effects reflects current agency enforcement guidance.").

The Third Way Report authors share many of the concerns in the Staff Report, but recommend further clarification and expert

10 See Rohit Chopra & Lina Kahn "The Case for "Unfair Methods of Competition" Rulemaking," *University of Chicago Law Review*: Vol. 87: Iss. 2, Article 4 (2020), available at https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4.

11 See e.g. Zephyr Teachout, "A Blueprint for a Trust-Busting Biden Presidency" (Dec. 18, 2020) available at https://newrepublic.com/article/160646/biden-antitrust-blueprint-monopoly-busting.

12 Global Competition Review, "Slaughter and Others React to House Report" (Oct. 16, 2020), available at https://globalcompetitionreview.com/gcr-usa/department-of-justice/slaughter-and-other-experts-react-house-report.

13 See Neil Chilson, "Little Law and No New Regulator: What's Missing in the House Antitrust Report" (Dec. 14, 2020) available at https://promarket.org/2020/12/14/new-regulator-big-tech-house-antitrust-report-neil-chilson/.

feedback on the majority staff's recommendations regarding: monopoly leveraging and predatory pricing; the essential-facilities doctrine; product improvements constituting monopolization ("it is a slippery slope to cut a platform's ability to make design changes completely, especially if these changes are made to benefit the consumer's experience"); overriding *Ohio v. American Express*; merger presumptions; and banning acquisitions of potential and nascent competitors (preferring legislation that restores the potential competition doctrine from the Sherman and Clayton Acts).

The Third Way Report specifically disagrees, however, with several other aspects of the Staff Report that it describes as "non-starters," including: efforts to require structural separation and delineating a "single line of business" for companies, claiming that this is "a thinly veiled call to break up Big Tech firms" and scorning the proposal as the "Glass-Steagall for the Internet"; private antitrust enforcement changes, including the elimination of forced arbitration clauses and lifting certain barriers to class creation in class actions; non-discrimination rules regarding equal terms for equal service; facilitating private enforcement; and creating additional regulatory schemes.

Nevertheless, the areas of agreement are significant and could signal that future negotiations regarding significant reforms will be fruitful.

IV. CONCLUSION

The Staff Report and the Third Way Report join numerous private and public reports in the U.S. and in many jurisdictions around the world that have sought to grapple with what are perceived as the competition policy challenges of the "digital economy."

In some respects, these two reports are more measured in their recommendations than prior advisory reports such as the *Stigler Committee on Digital Platforms Final Report* ("Stigler Report"). The Stigler Report recommended, for instance, the creation of a new digital regulator to oversee digital platform conduct and the establishment of a specialist competition court to hear all private and public antitrust cases, ideas that were not advanced by the Staff Report. Meanwhile, the Washington Center Report recommended the creation of a White House Competition Office within the National Economic Council. Similarly, under the just-formalized Digital Markets Act in the European Union, digital markets are being singled out for distinct treatment as a matter of institutional design. The newly created Digital Markets Unit in the UK also represents an institutional response to the perceived changing nature of the world's economy. Instead, the Staff Report's proposals hew more closely to traditional institutional norms of U.S. antitrust law and its application, relying principally on the DOJ and FTC for public enforcement and the private right of action.

On substance, however, the Staff Report proposals are bold and would result in the most significant overhaul of antitrust law in decades. Some of the proposals would require a major rethinking of analytical approaches that have become accepted in antitrust law – indeed, that is their point. And some will be tested in court by the already filed antitrust cases against some of the reports' subjects. Expansive reformist measures, however, are unlikely to gain bipartisan support in the U.S., regardless of who controls the Senate.

Although a lively debate is taking place in the U.S. about the effectiveness of current antitrust laws and enforcement capabilities, and we appear to be poised for change, the extent of that change remains uncertain at this time. Like the politics of our time, that debate has included very different perspectives and proposals for antitrust law's future. As long has been true of U.S. antitrust law, its outcome will turn in large part on the enforcement priorities of the incoming administration, the political will of Congress, and the courts. ■

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CPI COMPETITION POLICY INTERNATIONAL