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

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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 nondiscrimination 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. ■