Buckle Up: The Global Future of Antitrust Enforcement and Regulation

BY JAMES KEYTE, FRÉDÉRIC JENNY, AND ELEANOR FOX

TODAY'S GLOBAL ANTITRUST LANDSCAPE is a veritable whirlwind of antitrust enforcement and seemingly inevitable regulation. Unleashed by the global concern over the perceived power and entrenchment of tech platforms, enforcement agencies and private plaintiffs are aggressively seeking to enforce current antitrust laws across jurisdictions. Where perceived gaps in enforcement exist, governments are considering new laws and regulatory schemes that address the digital economy from a competition perspective and also take on consumer protection challenges involving contractual transparency, data protection, and privacy. These proposals, especially in the EU and U.K., are striking in that they do not appear to require traditional proof of dominance or misconduct; status as significant platforms—as newly defined—will trigger the proposed regulatory oversight and remedies. Moreover, the anticipated scope and detail of the regulation of Big Tech outside the U.S. is nothing short of breathtaking.

Change is fueled in part by a new and vibrant wave of distrust of corporate power. Leading the charge on the left is the Neo-Brandeisian movement. This school of thought not only rejects a narrowly defined consumer-welfare standard (a position shared by many centrist advocates), but at its extreme would use blunt regulatory instruments to deconcentrate markets. Further, the competition laws of many jurisdictions embrace non-market goals, including fairness, sustainability, and measures to help close a perceived inequality gap. And then there is the question of the pandemic and what role, if any, antitrust enforcement—and industrial organization—should play in a broader global effort to be ready for such catastrophic events. In all of these contexts, just keeping track of global antitrust is itself a challenge, let alone trying to assess or predict its future.

James Keyte is the Director of the Fordham Competition Law Institute, an Adjunct Professor of Comparative Antitrust Law at Fordham Law School, The Director of Global Development at The Brattle Group, and an Editor of ANTITRUST. Frédéric Jenny is the Professor Emeritus ESSEC Business School and the Chairman of the OECD Competition Committee. Eleanor Fox is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law.

Our objective here is, accordingly, limited. We wish to provide an overview of current trend lines in antitrust enforcement and regulation in the U.S. and EU, as well as those jurisdictions providing unique contributions in discrete areas. While our focus is on the U.S. and EU, which historically are the leading models for competition policy, we recognize that other jurisdictions are increasingly active, including in the pursuit of both competition and distributional goals. Our objective is not to assert what is right or what should be done, but to try to take stock of where we are, globally, and review what is in the works in terms of both enforcement and potential regulation across key subject areas.[1]

Enforcement and Regulation in the Digital Economy

The hottest antitrust topic by far in the past few years is the digital economy. In particular, how does it work? How should antitrust principles apply to it? And, how best to regulate it, if at all, from a competition perspective? In the broader scheme of things, the intersection of antitrust and the digital economy—especially so-called multi-sided platforms—is in its infancy. This is evident from the current state of antitrust enforcement and recently proposed regulation of large tech platforms, globally.

Conceptualization and Conduct Issues

One of the most significant challenges in applying antitrust law and policy to the digital economy is to understand how it functions and what, if anything, to do about it. It is well understood that firms operating as platforms connect those on one side wishing to interact with the other side (for example, to execute a transaction or interface in some fashion) and how advertisers (a third side) obtain access to those all-important clicks. We also know that network effects can reflect competition for the market (whether all or most of it) and that markets can reach a tipping point where dominant firms reach alleged monopoly status.

At the same time, the rapidity and scope of achieving network effects can itself facilitate both entry and dynamic competition, especially for complementary service platforms. We also know that indirect network effects often result in consumers' obtaining zero-price services, while the other side (who wish to have access to those users) pays for that privilege or leaves that to advertisers.

Even more complex are complementary multi-product or multi-service ecosystems (such as Google and Apple) that have been subject to less economic study, yet significant enforcement. These platforms involve a complex mixture of competition within the ecosystem (e.g., when the platform is vertically integrated) and competition among ecosystems, which by definition cut across a range of complementary markets and often involve users who are not necessarily inclined to switch platforms (so-called status quo bias).

In this complex and evolving environment, it is challenging for enforcement agencies and courts to superimpose their particular statutes, policies, and, where relevant, case law on particular platforms and alleged misconduct, often producing divergent results. Likewise, issues of effects, justifications and asserted counterfactuals can be particularly difficult to frame and resolve in specific matters.

United States: Case Law Constraints and Legislative Long Shots

In the last several months, enforcement (and private) antitrust cases against large tech platforms in the United States have been piling up. Nearly every aspect of the conduct of these firms is now under investigation or challenge and, to the surprise of some, much of the enforcement litigation arose from an aggressive Trump Federal Trade Commission and Department of Justice. Yet, U.S. antitrust law strongly favors the freedom of unilateral action by firms, even dominant ones, and especially those that succeed through innovation. It cannot be a violation of Section 2 of the Sherman Act merely to be a monopolist that enjoys the success of achieving strong network effects. Instead, there needs to be exclusionary conduct that harms competition, which usually means harm to consumers in a cognizable and demonstrable way. This is where the rubber meets the road in the U.S.: is the alleged conduct anticompetitively exclusionary? Does the alleged harm in this complex space fall within U.S. courts' view of harm to consumers? We suspect that this road will be bumpy for all the parties in U.S. litigation as well as for courts—at every level—as they grapple with the myriad issues in applying generalized principles of U.S. antitrust law.

Given these demands of the law, the U.S. agencies have a particularly challenging task to enforce U.S. antitrust law in the digital economy. In contrast to most competition authorities in non-U.S. jurisdictions, the DOJ and State Attorneys General cannot impose relief or penalties on firms without first filing actions in court, proving a violation (including requisite expert testimony), and persuading a court that the proposed remedy is appropriate; and the FTC's remedial powers are under challenge. Thus, when looking at today's veritable wave of new and ongoing antitrust litigation in the U.S., the applicable case law becomes critical.

To understand what this means for the unilateral conduct of large tech platforms, one typically looks first at market definition, and in the U.S. this means addressing *Amex*[2]—at least for transactional two-sided markets. (Again, markets involving ecosystem platforms can be much more complex.) Cases challenging platforms in the U.S. will have to contend with whether the relevant market fits within *Amex,* including whether the *Amex* jurisprudence can capture the relevant analyses and dynamics for multi-service or multi-product ecosystems.

Courts also will have to consider what *Amex* suggests in terms of procompetitive justifications where the platform involves strong indirect network effects. Much of this litigation will center around whether the conduct in question is procompetitive or enhances consumer welfare, even if it may harm competitors or rivals—a subject that remains central under U.S. case law. Again, this may be particularly complex in the context of multi-service or multi-product ecosystems where traditional approaches (focusing, e.g., on market definition and entry) may give way to new or creative advocacy.

Plaintiffs will have to prove that the alleged anticompetitive conduct increases, or at least helps maintain, the market power of a monopoly firm. Although in earlier days, theories of "leveraging" or denial of fair access to "essential facilities" were available, under *Trinko*[3] this is no longer so in the U.S. (except in the narrowest of circumstances). Moreover, refusal to deal in the U.S. generally does not qualify as antitrust misconduct (here too, with narrow exceptions).[4] And, finally, even where the conduct raises rivals' costs, most courts will require more than inference to connect an effect on rivals to market-wide harm and a reduction in consumer welfare. On this point of inferential harm, however, the court's opinion in *United States v. Microsoft* is quite flexible and may provide a roadmap for plaintiffs.[5] In fact, the analytical framework in *Microsoft* likely directed the scope in the DOJ's recent claim against Google relating to search and search advertising.[6]

Finally, as the *Qualcomm* case in the Ninth Circuit highlighted,[7] circuit courts in the U.S. have a significant say in what legal principles will control (there, overturning a refusal to deal/bundling claim involving standard essential patents), and the U.S. Supreme Court (presumably conservative in antitrust in light of *Amex*) will have the final say. While Supreme Court antitrust cases are relatively rare, we would expect the Court to take one or more of these tech challenges in the coming years, possibly to address competition involving platforms more generally and also due to the likelihood of several circuit splits as cases progress.

From a potential U.S. regulatory perspective, a Democratic-controlled majority in the Senate suggests continued momentum for significant change, but a radical new scheme remains unlikely. To be sure, the House Majority Staff Report from last October proposes an array of suggestions that would dramatically affect the antitrust landscape.[8] For example, the House Staff Report suggests breaking up Big Tech, consistent with a popular mistrust of large concentrations of power. In addition, the House Staff Report suggests, among other things: precluding most acquisitions by dominant firms; lowering market share presumptions for mergers and dominant behavior; shifting burdens of proof; revising the potential competition doctrine; reintroducing theories of leveraging and essential facilities; and directly overruling decisions such as *Amex*, *Trinko*, and *Twombly*.[9] And, since then, Senator Klobuchar has introduced new antitrust legislation (discussed later below).

In contrast to the EU, U.K., and elsewhere, however, the House Staff Report does not suggest the creation of a new digital enforcer and does not elaborate on how its proposals would be implemented. This suggests that the Report is more of a position piece than a concrete proposal. Others (including one author here), suggest that a less pervasive set of ex ante rules could be implemented through the FTC (perhaps using Section 5 or through new, targeted authorization) that focus specifically on areas where competition needs to be addressed directly—for example, the use of gatekeeper power to impede rivals or interfere with user switching.[10]

In any event, regardless of its composition, even a Democratic-controlled Senate will likely remain divided, which makes it unlikely that the Senate would remove the 60-vote rule required for eliminating filibusters (which would leave a majority rule for new legislation). At the same time, many Republicans wish to rein in Big Tech because of its asserted censorship of conservative views, and with a Democratic-controlled Senate now able to put proposed legislation on the table there is an increasing possibility that some new regulation targeting Big Tech could be constructed and passed. In the meantime, eyes should remain on the U.S. courts.

U.K.: More Enforcement and Targeted Regulation

Looking beyond the U.S., we put the U.K. up front as it is moving much more quickly than most (with the exception of Germany) in its effort to regulate large tech platforms as a supplement to (or even largely to displace) its enforcement efforts. While U.K. enforcement decisions are subject to judicial review, as with other non-U.S. jurisdictions in general, U.K. law does not carry the heavy burden of having to seek and obtain independent judicial action confirming the authority's enforcement decisions. Accordingly, as the U.K. develops its independent, post-Brexit competition strategy, it has significant flexibility to target Big Tech with a combined enforcement and regulatory effort, which it is now doing in earnest.

Early last year, the U.K.'s Competition Markets Authority (CMA) set up a Digital Markets Task Force, which issued its recommendations to the U.K. government in December 2020.[11] The focal point of the proposed regulatory scheme is to identify and oversee any platforms that reach "Strategic Market Status." This is a reference to achieving the type of arguably entrenched network effects that rivals find hard to crack and users difficult to give up (i.e., a disinclination to switch). Critically, this shift in approach would relieve the CMA of having to prove that a digital firm possesses a dominant position in a well-defined market, which the CMA had to prove in a pre-Brexit proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and under the U.K.'s national counterpart. Instead, these large platforms would be overseen by the Digital Markets Unit (DMU) that would devise and implement ex ante rules of the game, issuing a binding code of conduct with enforceable penalties. The DMU would also engage in interventions to unlock the marketplace for smaller rivals by addressing the sources of power, facilitating interoperability, portability, and user control of data. The idea is to have this regulatory scheme in place by mid-2021. Based on the absence of a legislative proposal to date, this now seems more unlikely to be the timeline.

EU: Aggressive Enforcement, Broader Regulations

Over the past decade the EU has been the global leader in investigating and penalizing tech platforms (among others), and its leadership is likely to continue. More significantly, perhaps—at least in the long run—the EU also is now deep in the process of considering broad regulation of tech in the form of the Digital Services Act and Digital Markets Act.[12]

To understand why the EU takes such a strong and comprehensive interest in controlling the power of large tech platforms, it is important to review some analytical history. Specifically, since the founding of the EU in the late 1950s, a paramount objective has been to create a single European market in which firms across jurisdictions face a non-discriminatory, level playing field and for which competition on the merits, as opposed to a local privileged status, is the driver of success. Indeed, Article 102, on its face, expressly includes notions of fairness and non-discrimination, which is dramatically different from the common law-based Section 2 of the Sherman Act and its case law over the past 40 years. Moreover, while there were several attempts in recent decades to infuse a more Chicago-School consumer-welfare standard into Article 102 (e.g., in the 2005 EAGCP Report[13] and the 2009 Guidance on Article 102[14]), the European courts have not accepted the notion that the predominant goal of competition law is the protection of consumer welfare.

Not surprisingly, then, both before and during the tenure of Executive Vice President Margrethe Vestager, EU antitrust enforcement against dominant firms centered around making markets more contestable, which in very practical terms involves identifying structures and conduct that handicap rivals. The primary focus is on identifying market impediments constraining efficient or potentially efficient rivals from competing on their merits, and then taking action to remove those impediments. Likewise, the Court of Justice long ago found that, under Article 102, dominant firms have a "special responsibility" not to distort competition.[15] Although the EU court in *Intel* moved to a more evidence-based assessment of effects (as opposed to formalistic rules of illegality),[16] it is still to be determined what the court means by "effects" and how to prove them. What we know with certainty, however, is that the courts in the EU continue to have a different understanding than in the U.S. for what can be viewed as an anticompetitive effect.

Like courts in the U.S., EU courts will be asked to consider—in the Big Tech context—whether the anticompetitive effects can be determined solely on the basis of foreclosure of rivals, or does a violation also require demonstrable proof of harm to consumers? And they will have to decide what is necessary to prove significant foreclosure. These are subjects where continued divergence among the U.S. and nearly all other jurisdictions remains likely.[17]

What we can predict is that the EU will continue to focus on any conduct of tech platforms that tends to entrench network effects, impede data portability by users or interoperability with rivals, or otherwise make it difficult for new entrants and rivals to achieve scale, especially where the conduct is likely to tip the market to dominance. And because the EU embraces leveraging as a theory of harm (without the need to prove that the use of leverage creates or entrenches market power), as well as a form of the essential facilities doctrine, the EU courts will likely continue to attach less significance to market definition.

Likewise, the concept of market power is likely to continue to be more broadly conceived in the EU than in the U.S., which reflects another difference in philosophy. It is sometimes said that the EU is more concerned with false negatives, whereas U.S. courts focus more on avoiding false positives. In our view, Europe is more concerned with removing barriers to outsiders (part of its single-market objective), while the U.S. is more concerned with preserving incumbents' freedom of action, especially firms that succeed through unilateral acts of innovation. The difficulty, of course, is that much of the unilateral conduct brought into question by enforcement litigation is ambiguous and its effects (helping or hurting consumers, incentivizing innovation) can be inherently speculative. Whether the EU enforcement preference is for chipping away at entry barriers or for safeguarding freedom of action may make the difference.

The EU, as well as several of its Member States, is also generally more aggressive than the U.S. in addressing data privacy and transparency as part of an antitrust enforcement focus.[18] Germany, for example, is moving particularly quickly in this area and France is planning efforts as well. The appropriateness of that effort may well reach the Court of Justice in due course, which could take up to 3–5 years. But, by that time the whole subject area may be superseded by new EU/Member State regulation.

On that front, the EU's announcement late last year of its planned Digital Markets and Digital Services Acts constitutes transformative regulation of tech platforms aimed at ensuring that large platforms cannot advantage themselves at the expense of their rivals on the platform and cannot entrench themselves or tip the market through frustrating interoperability and data portability. Moreover, it requires sharing of data to facilitate competition.[19] This ex ante approach to regulation of the rights and responsibilities of everyone in the ecosystem is at least more predictable, as is the expectation that the EU will enforce those rules. The Digital Services Act will focus on rules relating to accountability, transparency, etc., while the Digital Markets Act will address the challenges of platforms as marketplace gatekeepers. As with the proposed U.K. legislation, a significant aspect of the proposed Digital Markets Act is that, as a single market measure under Article 114 TFEU, its application and force does not require a traditional Article 102 violation or even an economic assessment of market power or exclusionary conduct. Platforms fall within the scope of this new regulation if they reach approximately 10 percent of the EU population (45 million users today), which would classify the platform as "systemic in nature." Subject to various criteria, sanctions could involve up to 10 percent of the firm's revenues, and the EU would also have broad powers to investigate markets and firms in the space. The proposed regulatory scheme—if approved at the EU level—is anticipated to become law in 2023.

Finally, many other countries are also taking up the mantle to address the perceived power and abuses of tech firms in terms of both enforcement (competition and consumer protection) and potential regulation. Australia has been particularly active in trying to cabin Big Tech's bargaining power with media, and we also see significant efforts similar to those of the EU in Japan, South Korea, China, Japan, and Brazil—and the list keeps growing.[20]

Acquisitions of Nascent Competitors—A Similar U.S./Non-U.S. Dichotomy

The amount of ink spilled, and Zoom screens filled, on nascent acquisitions is beyond measure. But that does not mean it is easy to predict what the future holds. In fact, the discussions often center as much on purported past agency "mistakes" as on what to do now and going forward. Nor do all jurisdictions have agencies with the power and discretion to reach back and challenge prior nascent acquisitions; and for those that can, they do not all face the same legal standards.

In trying to sort out (below) the nascent acquisition landscape, we find great enthusiasm in the U.S. for fixing lost opportunities from the past—but with an unclear legal path—whereas in the EU merger clearance is final. Nonetheless, for all jurisdictions there is enormous appetite to address nascent acquisitions going forward.

U.S.: Enthusiasm, But What of the Case Law?

As with other areas of enforcement, the U.S. antitrust agencies cannot, absent judicial action, simply break up Big

Tech by ordering it to spin off brands and business lines it acquired as start-ups. They must go to court and prove both a statutory violation and that divestiture is the appropriate remedy to restore competition (or that an injunction is the appropriate remedy if the deal is not yet consummated). There is precedent for seeking divestiture of past acquisitions that turn out to be anticompetitive (a subject beyond our scope), but its current application is far from clear. What we highlight here are some of the substantive issues presented under U.S. law for challenging acquisitions of nascent competitors, especially when seeking permanent injunctions or divestitures. These issues, among many others, will be front and center in several of the ongoing litigations.

As a starting point, anticompetitive acquisitions typically are the subject of challenge under Section 7 of the Clayton Act. Section 7 is an incipiency statute; it prohibits mergers whose effect "may be substantially to lessen competition."[21] The original notion was to prohibit anticompetitive mergers before their effects materialize, and to prohibit potentially anticompetitive horizontal, vertical, and conglomerate mergers. Beginning in the late 1970s, however, and continuing more dramatically in the 1980s and forward, the aggressive use of Section 7 was tempered by the agencies and the courts, which feared that the law was handicapping efficient mergers. Today, Section 7 is most commonly invoked to challenge horizontal acquisitions of substantial competitors and, at times, vertical acquisitions that may foreclose competition from either upstream or downstream rivals to the harm of consumers. Under current U.S. case law, conglomerate mergers are tough to stop as are (most relevant here) acquisitions of potential competitors—where the target firm is not yet in the market of the acquirer, but may enter, and the market loses the benefit of the entry effect.

For acquisitions involving potential (or future) competition, the Supreme Court in *United States v. Marine Bancorporation, Inc.* established a tough evidentiary standard: (1) that absent the merger, the potential competitor could enter the market (as a de novo entrant), and (2) that such entry would structurally deconcentrate the market or produce other demonstrable procompetitive effects.[22]

A present market effect is also required when considering competitors waiting in the wings—the perceived potential competition doctrine. The standard may be a challenge for cases brought under Section 7, and the question now is whether a new line of Section 7 jurisprudence can emerge. For example, could Section 7 apply if a dominant firm forms a policy to acquire all start-ups that it identifies as significant future challengers, and thus builds a moat of protection around its alleged monopoly power? Or could the acquiring firm's own assessment, prediction, and demonstrable intent provide the requisite inference and proof that each of the acquired start-ups could and would have entered (or expanded) on its own and offered consumer-enhancing rivalry in the market? Could the FTC also make a successful challenge under the more expansive language of Section 5 of the Federal Trade Commission Act? For all of these provocative questions, it will fall to the courts, and maybe eventually to the Supreme Court, to determine the outer boundaries of Section 7.

More immediately, as we see in some of the current litigated cases, the U.S. agencies have decided on a creative mix-and-match theory to challenge acquisitions of nascent competitors, using Section 2 monopolization principles (maintaining monopoly by acquiring competitive threats) for liability, while implicitly invoking Section 7 as the remedial basis for unwinding transactions. Here, the agencies have invoked language in *Microsoft*:

> We may infer causation [of anticompetitive effects] when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes . . . . [It] would be inimical to the purpose of the Sherman Act to allow monopolists free reign [sic] to squash nascent, albeit unproven, competitors at will . . . .[23]

The courts (particularly, now, in the *Facebook* litigation) will have to decide on the applicability of *Microsoft* to dominant platform acquisitions of small start-ups.[24] On the one hand, courts will need to consider the alleged plan (supported by documents, in the government's view) to stymie future competition and, on the other hand, the uncertain future of the start-ups at the time of an acquisition as compared with the actual dramatic growth and attractiveness to users of being a part of the platform's network. While many of these principles are not new, the waters are uncharted in the courts. It will likely take years for the issues to work their way through the U.S. court system, including, in our view, likely action by the Supreme Court.

Finally, in the U.S., in theory there is always a prospect of regulation apart from courts' antitrust decisions. But the prospect for regulation of acquisitions of nascent competitors is not necessarily rosy; it depends upon political will. Legislation may be especially challenging as the polarized factions of both the Republican and Democratic parties interact with a more moderate Democratic Executive (although one that is being advised by an aggressive progressive, Professor Tim Wu).[25] If the politics align, especially with the Democrats' new ability to garner support for legislation, the prospect of some rulemaking to proscribe dominant firms' acquisitions of their nascent rivals under some conditions (and with new substantive standards) is not beyond question.

EU/U.K.: An Emerging Prophylactic Approach

Outside of the U.S., the enforcement and regulatory approach to nascent-competitor acquisitions is quite different—in part more restrictive, in part more flexible. On the restrictive side, unlike in the U.S., there is only "one bite at the apple" in the EU for blocking acquisitions with an EU dimension. Once a merger has received clearance from the EU it cannot be investigated again except in exceptional circumstances, such as whether the clearance was based on false or misleading information. This is why many jurisdictions are modifying their merger notification requirements to cover more (if not all) acquisitions by large tech (or other) firms. Equally important, the EU enforcers may not use Article 102 dominance law to block transactions, as the EC Merger Regulation is the exclusive regulatory authority.[26] This precludes the hybrid approach currently asserted in the U.S. courts.

The flexibility is in the relative lack of constraining case law and the opportunity to explore new theories and approaches. Specifically, where the U.S. lower courts must grapple with the "potential competition doctrine" and the novelty of using Section 2 to attack consummated acquisitions, the EU and its Member States can explore new enforcement theories with few limiting parameters. Further, unlike with Articles 101 and 102, the Commission's decisions on mergers are not frequently challenged, and even more rarely reach the Court of Justice. Hence, if the EU believes that a nascent-competitor acquisition by a dominant platform will be anticompetitive under one or more theories of harm, it may pursue that theory, subject to appeal to the General Court and Court of Justice. This provides significant flexibility and enforcement creativity.

Nor are non-U.S. jurisdictions encumbered by the Chicago School conceptions of consumer welfare that prevail in the U.S. (as applied in the merger context). Particularly in the EU and its Member States, therefore, we can anticipate a significant increase in scrutiny of all forms of nascent-competitor acquisitions based on relatively aggressive theories of harm to dynamic competition, coupled, as usual, with vigorous debate over the asserted harm and/or procompetitive justifications for the transaction.

The U.K., however, is likely to take an even more targeted approach to nascent acquisitions, consistent with its broad proposed regulation of large tech platforms. In contrast to the EU (which does not need a regulatory change to its merger review processes to address nascent acquisitions), the CMA has put nascent acquisitions directly in its new regulatory cross hairs. It apparently is more concerned with the growing power of the Big Tech platforms, even if there is a significant (sometimes large) chance that the "but for" competitive threat would never have materialized and the acquisition enhanced the offerings by the platform. As Andrea Coscelli, Chief Executive of the CMA, has highlighted, enforcers in his view need to get comfortable with the notion that the inherent uncertainty of the but-for world is still worth addressing.[27] In essence, he is suggesting that competition is better preserved if the agencies take a dynamic and prophylactic approach to nascent acquisitions, a position that would be harder to argue and accept in the U.S. where inherent speculation is frowned upon in the case law both as a matter of liability and in seeking remedies, especially divestiture.

One can also anticipate, or at least prepare for, other jurisdictions to consider similar actions. The concern over nascent acquisitions by large tech firms is a recent and global one,[28] and (rightly or wrongly) it appears that outside of the U.S. there may be relative convergence on these more interventionist approaches.

A General Surge in Populism, But Not Uniformity in Approach

Independently of a particular focus on tech platforms (and, primarily, the challenge of dealing with network effects), there is a drumbeat in the U.S. and elsewhere for more aggressively enforcing (or modifying) competition laws to address industry concentration and the power of individual firms.[29] Whether referred to as Neo-Brandeisian or populism from a pre-Chicago School age, the thrust is similar: highly concentrated markets are said to lead to relatively higher corporate profits, wage disparity, barriers to entry, and decreased competitive opportunity. To address these perceived problems, the view is that antitrust needs to remove the constraints of a standard that proscribes only short-run, output-limiting, and price-raising conduct. Many in this group (whom we describe as Progressives) embrace a consumer welfare standard, but would apply it much more broadly and aggressively than conservatives.

Others (Neo-Brandeisians) would use consumer interests as one important focus of antitrust, but would widen the lens to consider exploitation of workers (beyond efficiency concerns), sustainability, inequality, and their perspective on democracy (freedom from business power that controls our lives). Moreover, their set of values leads to a policy position, sometimes more symbolic than actual, that seeks to break up Big Tech. For any of these objectives, particularly in the U.S., the question remains what is practical or feasible. Outside of the U.S., the more fundamental question is whether the Neo-Brandeisian debate is relevant given that in many jurisdictions competition law already is geared to control perceived power (although breaking up Big Tech has not seemed to be the first-line remedy).

The U.S.: Mainly Aspirational

In the U.S., the same limitations on case law/potential legislation dynamics are at play as with tech platforms, which may make the more aggressive proposals more aspirational than realistic. Every potential cause of action has its long-defined elements, and the consumer welfare standard that permeates theories of harm only has so much flexibility. For example, "abusive pricing" or "unequal bargaining positions" cannot be independent violations in the U.S.—separate exclusionary conduct would need to be present. Likewise, even in the merger space, market definition remains a requisite element that is probably not going to be jettisoned under current case law; whether concentration thresholds are likely to be reduced or burdens of proof shifted is a different question. For all of these long-established U.S. cases and theories, absent legislation, changes will be around the edges and incremental, as courts continue to determine how robustly the U.S. antitrust goals can accommodate such values as innovation, quality, and dynamic competition without crossing the boundaries into unreliable speculation.

While this continued iterative judicial process may add some flexibility under Section 2 and Section 7 (subject to the Supreme Court's view), these limits will have significant effect. In the view of many, Section 5 of the Federal Trade Commission Act may have more flexibility if the FTC chooses to use it. But true "progressive" developments in the U.S. would require new legislation.

Looking forward, the House is likely to offer piecemeal legislation addressing specific areas of conduct or desired changes in the law.[30] But the main focus for anticipated action should be on the Senate, as the new makeup of the Senate will likely shift the focus away from the aspirational House Majority Staff Report and onto the Senate Judiciary Subcommittee on Antitrust and Commerce, led by Senator Amy Klobuchar. Indeed, on February 4, 2021, Senator Klobuchar introduced a bill—the Competition and Antitrust Law Enforcement Reform Act—that would significantly modify Section 7 on mergers and Section 2 on monopolies (though not seeking to break up Big Tech).[31] On mergers, the Act would forbid mergers that "create an appreciable risk of materially lessening competition," where "materially" can be anything more than "de minimis."[32] It would also shift the burden of proof to the parties to disprove those effects for mergers that significantly increase concentration, involve nascent acquisitions by dominant firms (e.g., greater than 50 percent share), or involve mega mergers (over 5 billion dollars).[33]

As to unilateral conduct, the Act would expressly prohibit "exclusionary conduct," defined to include any conduct that materially disadvantages competitors and presents an "appreciable risk of harming competition."[34] Again, this adopts a much more prophylactic approach than Section 2. On its face, the Act would appear to overturn *Trinko,* bring leveraging back into play (as well as a fairly open-ended theory of raising rivals' costs), much like what we see in practice in the EU and elsewhere. Whether Senator Klobuchar's bill will garner the needed votes (likely requiring 60) is hard to predict at this stage, but the general anger and frustration among some Republicans toward Big Tech (again, often concerning asserted platform-related censorship) may put many of them in a receptive frame of mind. From a competition policy perspective, and as Senate hearings begin on potential legislation, it is clear that Senator Mike Lee is the figure to follow on the Republican side.[35]

U.K./EU: More Flexibility, But How Far To Go?

In contrast to the U.S., other jurisdictions have significant flexibility in addressing whether and to what extent they wish to pursue a more progressive agenda for antitrust policy and enforcement. At least as it relates to economic objectives (and the consumer-welfare debate), the EU and some Member States have made their more progressive agenda clear for some time. Executive Vice President and Commissioner Vestager has elaborated on the EU's digital-economy agenda on the global stage.

Hence, we have long seen from the EU Commission a commitment to interpreting Articles 101 and 102 in ways that promote non-discrimination among Member States, transparency for consumers, opportunities for new entrants and rivals, and no reluctance to invoke fairness in the application of competition principles. Again, this is largely baked into the Treaty itself. And what we see in the tech space, as well as other areas involving more complex markets (e.g., pharma, IP-driven industries), is the EU and Member States trying to figure out how best to apply these principles to the digital age and other complex industries, while still allowing firms to enjoy the benefits of scale and efficiencies. Sometimes the factors will all point in the same direction; but often it will be a delicate balance. Either way, as the EU continues to pursue its enforcement objectives, the debate will continue—and it will not slow down.

Finally, with the relative constraints of U.S. law and enforcement discretion, the future holds only a limited opportunity for convergence between Section 2 of the Sherman Act and TFEU Article 102, with perhaps a greater prospect in addressing mergers under Section 7 of the Clayton Act and the EU Merger Regulation. There is, however, a significant opportunity for an increase in multi-jurisdictional cooperation and coordination, especially as it relates to truly global "mega-mergers" as well as remedies. In this respect, the OECD and ICN are promoting increased cooperation among agencies. A joint OECD/ICN report on the state of international cooperation was presented at the last OECD Competition Committee in December 2020, and this is an area in which the ICN and OECD could make significant strides in the coming years, especially as non-U.S. enforcement continues to converge.[36]

Socio-Political Objectives: Needed Coordination and Bold Leaders

Beyond the narrowly focused debate that tends to center on the U.S. version of the consumer-welfare standard, there is a broader view of antitrust that is gaining significant traction in several parts of the globe. In the U.S., it is sometimes difficult to see competition law and enforcement evolving beyond the current case law and its free market underpinnings—each based in part on markets that generally work well, on the absence of a history of state-owned enterprise, and perhaps on a certain faith in the purity and continuity of antitrust. But for many other countries, there is an equal and growing pull from two other perspectives: first, industrial policy, recognizing a government role in partnering with industries—or prohibiting or commanding certain behaviors—ideally to the benefit of all marketplace constituents; and second, socio-political objectives as values of or constraints on antitrust, including concerns as wide ranging as sustainability and distributional equality.[37] While inclusion of these considerations may be anathema to some (particularly those of the strictest Chicago-School persuasion), the future of global antitrust rightly highlights where these policies are embraced and gaining traction.

The Pandemic: A Need for Global Coordination

Along with the many other lessons to be learned from the enormous tragedy of the global pandemic, one must be that antitrust as usual is not necessarily optimal in a time where there is a critical need for certain types of supplies, innovation, and collaboration. Moreover, for global pandemics, there is the obvious question of how global market coordination can best be effectuated to meet legitimate and demonstrable needs of suppliers and consumers without creating long-term adverse effects on particular markets or consumers.

What we have learned, however, is that different jurisdictions were equipped differently—or not at all—to make antitrust-related adjustments for pandemic conditions. In the U.S., for example, there certainly was discussion, within cases or investigations, of a greater emphasis on "changing market conditions" and "failing/flailing" firm arguments to justify certain collaborations or mergers. While the authorities were open to business review consultation, for the most part the U.S. antitrust analysis was, and remains, ill-equipped to adjust for such events (although in an analogous war footing, past courts have modified antitrust analysis, though with arguably questionable justification and effect). Looking to the future, one naturally asks—as one of the authors has—whether it is not advisable to address the next pandemic with a global, ex ante industrial organization strategy rather than the piecemeal response that we saw in 2020 and that persists today?[38] Given the effect of the pandemic on both lives and markets across the globe, such an effort should have few serious detractors.

Sustainability: An Antitrust Role?

The subject of antitrust and sustainability requires a more nuanced analysis, although many would say one of similar urgency and potentially even greater harm. Moreover, one can easily argue that a commitment by a firm to sustainable production processes and products is a quality dimension for many consumers. Conversely, some jurisdictions are wary of a consumer welfare standard drifting, without objective criteria, to a far broader citizen welfare standard. Moreover, there is a significant risk in this area of "green washing"—dressing up potentially anticompetitive collaborations, excessive pricing, or mergers in a sustainability cloak, even perhaps fraudulently.

For those jurisdictions that view sustainability as a dimension of competition, however, it is more of a matter of application. The OECD, for example, is committed to sustainability as an express competition policy objective (by resolution) and sees sustainability as a clear quality dimension of supply and demand.[39] As for the EU, Executive Vice President Vestager sees antitrust "playing a part" in the sustainability objective, engaging in a public consultation on the subject in November 2020.[40] The Netherlands is much more aggressive in making sustainability a factor in its antitrust analyses (including mergers), while being attuned to risks of unpredictability as well as potential adverse effects on consumers.[41] Greece and Germany are not far behind in their consideration and effects.[42] Again, this is an area to watch closely, even if in the U.S. these objectives tend inherently to fall outside the purview of antitrust policy and enforcement, absent new legislation.

Wealth Distribution and Economic Opportunity

Probably the most ambitious use of antitrust for socio-political objectives relates to: (1) redistribution of wealth from firms to consumers, and to labor in particular, and (2) using or capturing antitrust principles to further inclusiveness in the economy, including to address historical racial inequalities, or other perceived inequities.

The first of these has some overlap with traditional antitrust objectives, but looking more from the labor perspective. Even in the U.S., for example, the last few years have seen a significant focus on cartel behavior in labor markets, including a recent criminal case.[43] And while some of the cases have difficult challenges in separating out potentially justifiable collaborative conduct,—e.g., in the franchise area where specific investments often are made in training, etc.,—the new (and global) focus on preserving and promoting competition for labor (or other upstream inputs) can have important distributional effects.

More broadly, however, it is a challenge to include effects on labor into cases involving dominance or mergers where traditional efficiency analysis often reflects a reduction in labor pools or costs as part of the efficiencies that justify the merger or conduct. For those countries addressing these issues, it is a balance they are willing to tackle. As for pursuing greater participation economically for those who have been historically disenfranchised, only a few countries have incorporated these objectives. Most prominently, South Africa has established itself as a leader in promoting greater ownership by historically disadvantaged people. Amendments that became effective in 2019 and 2020 added teeth to objectives to spread ownership to historically disadvantaged persons, who are the majority of the population and were excluded by the heinous apartheid laws.[44] They also boost the condition of small and middle-sized business by addressing dominance, agreements, and mergers.

A majority of the competition laws in the world include some public interest elements. These typically include a clearer path for small and middle-sized business and conditions to ease the hardships of employees made redundant by mergers. For many, these efforts signify what can be done to have antitrust play a part in promoting fairness and equality, while for others efforts of this type carry inherent ambiguity and potential politicization, departing too dramatically from a consumer-welfare focus. Again, it is something to watch for, including beyond South Africa's particular efforts.

Conclusion

Looking at 2021 and beyond, global antitrust enforcement and regulation is likely to have a significant impact on firms, industries, and consumers alike. Yet, because the U.S. remains tied to established case law and a more efficiency focused or laissez-faire consumer-welfare standard (likely to remain that way with the new composition of the Supreme Court), the U.S. is least likely to see change, absent legislation. In this environment, however, the U.S. is increasingly becoming an outlier in a global arena that tends to see market power and its abuse where U.S. antitrust law does not and also appears willing to address that perceived power and abuse (again rightly or wrongly) directly, including through new regulatory schemes. These new schemes will be massive in comprehension and may largely displace enforcement efforts in the whole sector.

This is where the future battleground of global antitrust is shifting. Those in the trenches best prepare, while others should watch carefully as the global antitrust roads are as bumpy as ever. ■

---

[1] In this three-way collaboration, not all of the authors agree with every statement and formulation presented here, but strongly support multi-perspective discussion of these critical issues.

[2] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[3] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 410, 415 (2004).

[4] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985).

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

[6] Compliant, United States v. Google LLC, No. 1:20-CV-3010 (D.D.C. Oct. 20, 2020).

[7] FTC v. Qualcomm, Inc., 969 F.3d 974 (9th Cir. 2020).

[8] Staff of H. Comm. on the Judiciary, 116th Cong., Investigation of Competition of Digital Markets: Majority Staff Report and Recommendations 39 (2020) [hereinafter House Staff Report or Report].

[9] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[10] *See* Eleanor M. Fox & Harry First, *We Need Rules to Rein in Big Tech*, CPI Antitrust Chron., Oct. 2020, at 1, 4.

[11] Competition & Markets Authority, A New Pro-Competition Regime for Digital Markets, Advice of the Digital Markets Taskforce (Dec. 2020), https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf.

[12] European Commission Press Release IP/20/2347, Europe Fit for the Digital Age: Commission Proposes New Rules for Digital Platforms (Dec. 15, 2020) [hereinafter Europe Fit for the Digital Age].

[13] Jordi Gual et al., Report by the EAGCP, An Economic Approach to Article 82 (2005), https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf.

[14] Eur. Comm'n, DG Competition, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7 (Dec. 3, 2008).

[15] *See generally* Romano Subiotto, David R. Little & Romi Lepetska, T*he Application of Article 102 TFEU by the European Commission and the European Courts*, 7 J. Eur. Competition L. & Prac. 288, 293 (2016).

[16] Case C-413/14 P, Intel Corp. v. Comm'n, ECLI:EU:C:2017:632 (CJ Sept. 6, 2017).

[17] *See* Eleanor M. Fox, *Monopolization and Abuse of Dominance: Why Europe Is Different,* 59 Antitrust Bull. 1, 129 (2014); *see also* James A. Keyte, *Why the Atlantic Divide on Monopoly/Dominance Law and Enforcement Is So Difficult to Bridge*, Antitrust, Fall 2018, at 113 .

[18] *See generally* Sintia Radu, *The World Wants More Tech Regulation*, U.S. News & World Rep. (Jan. 15, 2020).

[19] *See* Europe Fit for the Digital Age, *supra* note 12.

[20] *See* Leah Nylen, *U.S. Playing Catch Up in Regulation Big Tech*, Politico (Oct. 9, 2020).

[21] 15 U.S.C. § 18.

[22] United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974).

[23] *See Microsoft*, 253 F.3d at 79.

[24] Complaint, FTC v. Facebook, Inc. No. 1:20-CV-03590 (D.D.C. Jan. 13, 2021).

[25] Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. Times (Mar. 5, 2021).

[26] *See* Council Regulation (E.C.) No. 139/2004 of Jan. 20, 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24).

[27] *See* Andrea Coscelli, Chief Exec., CMA, Ahead of the Curve, Bannerman Competition Lecture (Feb. 9, 2021), https://www.gov.uk/government/speeches/andrea-coscelli-ahead-of-the-curve-bannerman-competition-lecture

[28] *See* OECD, Directorate For Financial and Enterprise Affairs, Competition Committee, Start-ups, Killer Acquisitions and Merger Control–Background Note (May 12, 2020).

[29] *See* ABA Antitrust Law Section, Report of the Task Force on the Future of Competition Law Standards; *see also* Leon B. Greenfield, Perry A. Lange & Nicole Callan, *Antitrust Populism and the Consumer Welfare Standard: What Are We Actually Debating*, 83 Antitrust L.J. 393, 400–06 (2020).

[30] *See U.S. House Antitrust Chairman Plans Multiple Bills To Go After Big Tech*, Reuters (Mar. 21, 2021).

[31] Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, 117th Cong. 1st Sess. (2021).

[32] *Id.* § 4.

[33] *Id.*

[34] *Id.* § 9.

[35] *See* Matthew Perlman, *Senate Antitrust Panel Mulls Legislative Reforms, Big Tech*, Law360 (Mar. 11, 2020).

[36] *See* OECD/ICN, OECD/ICN Report on International Co-operation in Competition Enforcement (2021), http://www.oecd.org/daf/competition/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf.

[37] *See* Eleanor M. Fox, *Antitrust and Power: The State, the Market, and the Virus*, CPI (Apr. 13, 2020), https://www.competitionpolicyinternational.com/antitrust-and-power-the-state-the-market-and-the-virus/.

[38] *See* Frédéric Jenny, Chair, OECD Competition Committee, *Economic Resilience, Globalisation and Market Governance: Facing the Covid-19 Test* (Mar. 28, 2020).

[39] Julian Nowag, Background Note, *Sustainability and Competiton Law and Policy*, OECD (Dec. 1 2020) (discussing policy history competition issues).

[40] Margrethe Vestager, Executive Vice-President, European Comm'n, The Green Deal and Competition Policy, Speech (Sept. 22, 2020), https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/green-deal-and-competition-policy_en.

[41] Netherlands Authority for Consumers and Markets (ACM), Draft Guidelines: Sustainability Agreements (July 9, 2020), https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.

[42] Hellenic Competition Commission, Draft Staff Discussion Paper on Sustainability Issues and Competition Law (Sept. 16, 2020), https://www.epant.gr/en/enimerosi/competition-law-sustainability/item/download/1896_9b05dc293adbae88a7bb6cce37d1ea60.html; Bundeskartellamt, Offene Märkte und Nachhaltiges Wirtschaften—Gemeinwohlziele als Herausforderung für die Kartellrechtspraxis (Oct. 1, 2020), https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2020_Hintergrundpapier.pdf?__blob=publicationFile&v=2.

[43] Indictment, United States. v. Jindal, Case No. 4:20-cr-00358ALM-KPJ (E.D. Tex. Dec. 9, 2020).

[44] Competition Amendment Act of 2018 (S. Afr.).