

Appendix 1: Antitrust as a Solution

Expectations for antitrust enforcement should be realistic.

The antitrust laws protect competition, the United States’ fundamental national economic policy,”²¹ and they should be applied to major digital platforms just as to other actors in the economy. It is important in the context of the platforms, however, to assess as carefully as possible what antitrust enforcement can accomplish and how reliably it can do so.

This review concludes, just as others on both sides of the Atlantic that have studied the issue, that enforcement of competition laws is useful but not sufficient.²²

To be effective, antitrust enforcement in this realm should be accompanied and aided, not superseded, by a specialized regulatory agency. Support for this view can be found, among other places, in the debate over the “essential facilities” doctrine, the substance of which centers upon whether firms controlling non-replicable assets should be required to make them available. In essence, it asks if these firms should be required to deal with competitors. The conclusion that there is an antitrust law duty to deal inevitably raises a new controversy centered on the capacity of generalist judges to administer complex conduct remedies, a consideration ameliorated by the presence of a specialized regulatory agency.

This study does not address whether any of the numerous antitrust investigations of major digital platforms undertaken in 2019 and 2020 should lead to prosecutions. Rather, consistent with the Stigler Antitrust Report, the product of a distinguished committee of scholars convened under the auspices of the University of Chicago Business School, it considers what would be required to introduce meaningful competitive alternatives to the platforms in light of their characteristics.²³

Expectations for antitrust enforcement should be realistic. Any antitrust prosecution, and especially one pursuant to the Sherman Act’s monopolization provisions,

21 *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 218 (1966).

22 *See, e.g., DG Comp, Special Advisors [Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer], COMPETITION POLICY FOR THE DIGITAL ERA, (Final Report, 2019) (“Vestager Report”); Jason Furman, UNLOCKING DIGITAL COMPETITION, Report of the Digital Competition Expert Panel, (Mar. 2019) (“Furman UK Report”); Stigler Antitrust Report, supra note 12; CMA Final Report, supra note 14; United Kingdom Competition and Markets Authority, ONLINE PLATFORMS AND DIGITAL ADVERTISING MARKET STUDY, (Interim Report, 2019) (“CMA Interim Report”). For an account of other domestic and foreign initiatives addressing major platform issues included in a broad and critical review of the major platforms, see DIPAYAN GHOSH, TERMS OF DISSERVICE: HOW SILICON VALLEY IS DESTRUCTIVE BY DESIGN, Brookings Institution Press (Jun. 16, 2020), at 30–38, 212–219.*

These proposals would complement competition law requirements and in particular could abet a species of antitrust remedies that, while precedent, has fallen out of favor.

necessarily confronts a range of practical considerations. For digital platforms such as Google, Facebook, and Amazon, they include the unavoidable uncertainties surrounding litigated outcomes; the time to resolution; the changes in technology, business models, and consumer preferences that will occur inside the time envelope; and the difficulty in conceiving remedies that are sure to bring net benefits.

The need for something beyond what contemporary antitrust orthodoxy reliably enables has been highlighted in the previously noted studies. This study seeks to build on their recommendations, which converge both upon obligatory access to data aggregations, obligatory interoperability of digital platforms, and prohibitions on discrimination and upon the need for a specialized regulatory agency to interpret and enforce these requirements. If effected, these proposals would complement competition law requirements and in particular could abet a species of antitrust remedies that, while precedent, has fallen out of favor.

Threshold Issues

The question of whether the antitrust laws can be relied upon to ameliorate the concerns presented by the major digital platforms and their strong positions in the marketplace is affected by two considerations.

First, involving liability. Over the last several decades, the prevailing interpretation has progressively narrowed the reach of the antitrust laws, making both government and private actions against claimed anticompetitive activities difficult to sustain. Very recently, this prevailing orthodoxy has come under fierce attack, but

23 STIGLER ANTITRUST REPORT *supra* note 12, at 59–60:

[R]apid self-correction in markets dominated by large digital platforms is unlikely, and ... harms to economic welfare from the exercise of market power in such markets are substantial. [E]ntrants find it difficult to overcome the high barriers to take on digital platform incumbents. Economies of scale, economies of scope, network effects, and negligible marginal cost all work together to make entry difficult in existing markets. Moreover, while monopoly profits are a lure to competitors, incumbents can use those very profits to entrench themselves and protect their position. No matter how dynamic the technology, an entrant will not unseat a monopolist if the monopolist is permitted to buy the dynamic entrant for a share of monopoly profits. Both parties gain from such a transaction—and the public loses.

The result is less entry than a more competitive environment would create. Less entry into digital markets means fewer choices for consumers, stunted development of alternative paths of innovation, higher prices, and lower quality. Self-correction is not a realistic expectation in this environment—indeed, the available evidence suggests it has not happened—and public policy should not rely exclusively on it.

24 See, e.g., DG Comp, Special Advisors [Jacques Crémer, Yves-Alexandre de Montjoye, Heike See, e.g., CMA INTERIM REPORT, *supra* note 22, at 230, 232:

[O]ur study supports the high-level positions set out in the Furman Review and the Stigler Center Review earlier this year, both of which called for stronger ex ante rules to address the competition concerns arising from the increasingly important role that large online platforms play in the economy. . .

[T]he interventions that we consider. . . would need some form of regulatory body to implement them. This is consistent with the findings of the Furman Review, which called for a Digital Markets Unit to be created in the UK, and the Stigler Center Review, which called for the creation of a Digital Authority in the US.

Many of the negative externalities that are inherent in the platforms' business models lie outside of the reach of antitrust.

there is not yet any firm indication of any material adjustments. Non-intervention remains the default position.²⁵

Second, involving remedy. Even if there were major adjustments in the proper reach of the antitrust laws, many of the concerns presented by the largest digital platforms would fall outside of plausible antitrust-based enforcement and remediation. Many of the negative externalities that are inherent in the platforms' business models lie outside of the reach of antitrust unless it were to produce large increases in competition accompanied by very large increases in the variety of offerings. It's not realistic to expect antitrust to have an important influence on privacy, data security, hate speech, imminent incitements to violence, malign foreign influence, or misinformation. Amelioration of these and other similar problems will have to come, if at all, from other sources, especially if they are to be dealt with in anything like the near-term.²⁶ But even more limited aspirations addressing only narrowly defined economic issues present very serious challenges with respect to remedies. This is where the learning surrounding the essential facilities doctrine is instructive.

Taken together, the state of the relevant jurisprudence and numerous associated practical considerations cast a shadow over the efficacy of existing competition laws as a major—let alone the principal—legal mechanism securing society's interests in the operations of major platforms. Describing the considerations involved in deploying the antitrust laws against digital platform power raises the question—a very significant one—of whether it would be better to look elsewhere

²⁵ See, e.g., STIGLER ANTITRUST REPORT *supra* note 12, at 72:

[O]versimplified Chicago School thinking has provided a widely accepted framework for antitrust analysis for more than thirty years. Perhaps more importantly, many federal judges, appointed by an increasingly ideological vetting process, are trained in and adherents of that framework. Many seem unaware of new economic research that calls into question many of the tenets of that framework and continue to cite outdated Chicago School publications of the 1970s and 1980s. And, while there has been a great deal of economic research and literature on which a new antitrust paradigm could be constructed, there is not a widely accepted, alternative paradigm that is comprehensible to and administrable by lawyers and judges. Even if such a paradigm were written tomorrow and rapidly became widely accepted, it would likely take years for that paradigm to be manifest in doctrinal changes and market outcomes.

²⁶ See, e.g., Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPECT. 69, 79 (2019):

Antitrust is not designed or equipped to deal with many of the major social and political problems associated with the tech titans, including threats to consumer privacy and data security, or with the spread of hateful speech and fake news. Indeed, it is not clear that more competition would provide consumers with greater privacy or would better combat information disorder; unregulated competition might instead trigger a race to the bottom, and many smaller firms might be harder to regulate than a few large ones.

Addressing these major problems requires sector-specific regulation.

See also, Statement of Joan Donovan, Director, Technology and Social Change Research Project, Harvard Kennedy School's Shorenstein Center On Media, Politics and Public Policy, Hearing on "Americans at Risk: Manipulation and Deception in the Digital Age," before the Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce, U.S. House of Representatives (Dec. 5, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/010820%20CPC%20Hearing%20Testimony_Donovan.pdf

for such assurances or to add complementary, compensatory legal authorities to the existing jurisprudential mix.²⁷

This is not to say that the use of the antitrust laws should be abandoned. If history is a guide, there is a meaningful possibility that antitrust enforcement activities will produce value commensurate with their costs.

Basis for Antitrust Enforcement

The jurisprudential bases for the government investigations and any ultimate interventions are Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

Section 2 of the Sherman Act makes it illegal to “monopolize, or attempt to monopolize, or combine or conspire. . . to monopolize any part of. . . trade or commerce.” Section 2 does not make the holding of a monopoly illegal, nor does it make certain exercises of monopoly power illegal. In this regard, it is considerably narrower than its European counterpart, which makes abuse of a dominant position (essentially, monopoly leveraging in U.S. jurisprudence) actionable. What Section 2 does make illegal is the acquisition or maintenance of monopoly through impermissible means. The principal judicial elaboration on the statutory text does not provide a high degree of clarity. The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.²⁸ The indeterminate aspect of this important legal standard has been commented upon regularly for more than a century, quite often with a certain asperity.²⁹

Section 7 of the Clayton Act, the principal merger control provision in U.S. law, forbids acquisitions “the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly.” The provision, which in one form or another has been around since 1914, was significantly strengthened by an amendment in 1950 and by the passage of the Hart-Scott-Rodino Antitrust Improvements Act in 1976. The latter provision subjects any merger or acquisition of significant size to pre-merger review by the Antitrust Division or the Federal Trade Commission. While not literally requiring merging firms to obtain prior government approval, the effect of the process is not dissimilar. The antitrust agencies, while retaining the burden of proof that a merger may substantially lessen competition, have the opportunity to seek an injunction against the consummation of any suspect transaction. The conventional use of Section 7, then, involves challenging question-

²⁷ Furman UK Report, *supra* note 22, at 5; STIGLER ANTITRUST REPORT, *supra* note 12, at 8: While US antitrust law has long been flexible in combating anticompetitive conduct, there is increasing concern that it has been underenforced in recent years. Antitrust law and its application by the courts over the past several decades have reflected the now outdated learning of an earlier era of economic thought, and they appear in some respects inhospitable to new learning. Antitrust enforcement better suited to the challenges of the Digital Age may therefore require new legislation.

See also *id.*, at 64–65.

²⁸ United States v. Grinnell Corp., 384 U.S. 563 (1966).

The last two significant government monopolization prosecutions, afford a reflection on the protracted nature of judicial proceedings.

able acquisitions before they can be consummated. Although it is not commonly employed, Section 7 also enables litigants to undo mergers after they have been consummated.³⁰

The last two significant government monopolization prosecutions, against AT&T and Microsoft, both technology companies, provide illustrations of the challenges inherent in Section 2 enforcement. They afford a reflection on the protracted nature of judicial proceedings, the possibility of changing technology and business models while litigation is pending, and what may be most important of all: the uncertainty of what would come from a successful prosecution.

The Microsoft case provides a particularly vivid example of the dynamic marketplace changes that could be expected in the course of a Section 2 prosecution of a technology sector defendant.

According to . . . the Department of Justice, Microsoft promoted the use of its own internet browser by integrating it into its Windows software, negotiating exclusive dealing contracts with internet service providers and software producers, cutting deals with computer makers to install the browser on all new computers they sold, and threatening those who made similar arrangements with other browser companies with a loss of business. A federal district court found Microsoft in violation of the Sherman Act and ordered the company broken up. An appeals court vacated the breakup order and reversed some of the lower court’s findings, but it affirmed other findings and remanded still others for further consideration. Microsoft then settled the case. . . . After the settlement, Microsoft’s browser sank into obscurity, but so did the competing browsers that were the main beneficiaries of the antitrust action.

²⁹ See Shapiro, *supra* note 26, at 80: “The portion of the Sherman Act dealing with monopolies is remarkably broad—and vague.” Gregory J. Werden, *How Chief Justice White Hampered Development of Limiting Principles for Section 2 of the Sherman Act and What Can Be Done About It Now*, 13 OHIO ST. BUS. L.J. 63, 96 (2019): “The Supreme Court took nearly a century to articulate what Section 2 does and does not prohibit and still has not crystallized the limiting principles courts have groped for since 1891.” And see Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1049 (2000):

Perhaps unfortunately, nothing in the monopolization statute defines precisely, or even generally, when government intervention is necessary. Given this lack of a statutory definition and our underlying commitment to markets, one must conclude that anti-trust intervention is appropriate only when we can have some confidence that intervention will make a particular market work better. Further, the improvements have to be sufficient to justify the expenses and uncertainty costs that accompany intervention, and these can be substantial. Finally, monopolistic conduct comes in unlimited varieties, many of which cannot even be anticipated until the technology that makes them possible has been developed. This gives the judge the unusually difficult task of applying extremely open-ended statutory language to an exceptionally open-ended set of circumstances. As a result, about the best we can do is define monopolization at a high level of generality and hope that our federal tribunals are both undaunted and circumspect.

³⁰ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *Saint Alphonsus Med. Center-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, Civil Action No. 3:16-cv-545 (E.D. Va. Apr. 16, 2018). While indicating that Section 7 can be used against consummated mergers, Professor Hemphill describes why antitrust prosecutors could find Section 2 to be a better mechanism. C. Scott Hemphill, *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*, 119 COLUM. L. REV. 1973, 1986-1989 (2019).

To increase the possibility that competition will improve the overall performance of the major platforms, especially within reasonable timeframes, more than conventional antitrust prosecutions and remedies will be required.

In 2008, Google introduced Chrome, a new browser that quickly swept away the competition. Ten years later Chrome had a 63 percent share of the global browser market, with Apple’s Safari a distant second at 14 percent. The browsers involved in the antitrust suit had been completely left in the dust.³¹

The AT&T case, which commenced 45 years ago, ended in a settlement that broke up the country’s tightly vertically integrated telephone system. More than nine years elapsed between the filing of the complaint and the implementation of the settlement.

Assessing the time involved in the Microsoft prosecution requires an arbitrary judgment due to the fact that the monopolization complaint, filed in 1998, had a series of antecedents. As a formal matter, the 1998 complaint ended in a settlement in 2002; a more inclusive account of the controversy begins with an FTC investigation in 1990 and ends with judicial approval of the settlement in 2004. Unlike AT&T, Microsoft led not to structural changes but conduct requirements that generally have been judged to have been ineffective, at least in a formal sense.³²

Platforms and Antitrust

With respect to the digital platforms, the most important contribution of antitrust—to the extent it creates additional competition—is likely to be increasing dynamism in an already dynamic sector. This was the explicit aim and formal result in *U.S. v. AT&T* and the informal result in *U.S. v. Microsoft*.

Notwithstanding indisputable economic concentration and serious negative externalities, the sector produces a great deal of value.³³ The question is, could

31 Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSPECT. 94, 111 (2019) (citations omitted).

32 See F.M. Scherer, *Technological Innovation and Monopolization*, Faculty Research Working Paper Series, John F. Kennedy School of Government, Harvard University (Oct. 2007). Professor Scherer, one of the United States’ leading antitrust economists, provides an informative perspective on the AT&T and Microsoft cases, at 13–24, 37–47. After reviewing several significant antitrust prosecutions, including AT&T and Microsoft, Professor Scherer concluded at 47–48:

In a majority of the cases, it took far too long, and in some instances several attempts, to come to grips with the problems. By the time the courts were ready for judgment, technological and economic changes had radically altered the environment in which the remedies originally sought would apply. This holds true for the unusually expeditious Microsoft litigation, which, at least in the United States, achieved little or nothing in the end. The most rapid solutions were achieved through negotiated consent decrees, which require a belief on the part of the respondents that they will not be seriously disadvantaged. In . . . AT&T (1982), the corporate settler [was] too optimistic—the decree[] did open up avenues for substantially enhanced technological competition. . . . In Microsoft, Judge Jackson struggled admirably to weigh the benefits of browser integration against competitive harm, but his efforts were insufficient to convince a skeptical Court of Appeals fearful of impeding technological progress and reluctant to undertake the job on its own.

33 See Ghosh, *supra* note 22, at 28, noting that even as criticism of the major platforms has grown, “the vast majority of internet users” continue to regard the consumer internet firms as providing “the tremendous gift of connectivity.”

Part of the reason legislation will be required lies in the contemporary interpretation of the proper scope of the substance and enforcement of the antitrust laws.

it produce even more? To increase the possibility that competition will improve the overall performance of the major platforms, especially within reasonable time-frames, more than conventional antitrust prosecutions and remedies will be required. The most efficacious single adjustment to the status quo would involve providing third parties—competitors and potential competitors—rights of access to the “essential facilities” controlled by the major platforms. Imposing a duty to deal with respect to data sets required to offer targeted advertising offers the possibility of increased competition. Imposing a duty to deal with respect to the elements of ad tech required to serve digital advertising also offers the promise of increased competition. So too does requiring interoperability among competing platforms. The other previously noted studies of the major platforms reached the same conclusion.³⁴ More competition would lead to improved economic performance with the predictable consequences that advertisers would pay less and publishers would receive more in the case of targeted advertising, and more generally the public would see some improvement in the quantity and quality of the information and services that it receives online.

However, the imposition of duties to deal, as a matter of antitrust remediation is extremely fraught given the inherent delays and uncertainty endemic to antitrust litigation, among other reasons. If it is to happen, and especially in any meaningful timeframe, it almost certainly will have to happen by legislation.

The Chicago School and its Critics

Part of the reason legislation will be required lies in the contemporary interpretation of the proper scope of the substance and enforcement of the antitrust laws by their authoritative interpreters: the courts and federal prosecutors.

This comes in the midst of a debate about the proper role and administration of antitrust law—a fierce, direct encounter between the long-entrenched Chicago School and insurgents often described as Brandeisians, to oversimplify. The debate involves numerous differences in emphasis and approach, between perspectives viewing government intervention in the economy as normally unwarranted and harmful and, alternatively, viewing government intervention as necessary to protect competition, economic dynamism, and other values.

The Chicago School, so named because associated with the work of scholars at the University of Chicago Law School in the mid-twentieth century, is and has been for more than forty years the single most important source of antitrust wisdom. It advances a set of policy perspectives grounded on the view that the ability of the antitrust laws to produce effective, let alone timely, improvements in most cases is doubtful, even as against firms with undoubted market power.³⁵

The source of that aversion—illustrated most vividly in the Chicago School’s disinclination to interfere with single firm conduct—is that market power is not likely sustainable over extended periods because its exercise will invite entry, that hard competition is desirable and should be welcomed rather than deterred, and

³⁴ See *supra* note 22.

³⁵ For an interesting and admittedly tendentious history, see BINYAMIN APPELBAUM, *THE ECONOMIST’S HOUR: FREE MARKETS AND THE FRACTURE OF SOCIETY*, Little Brown & Co. (2019).

The willingness to expand the focus of antitrust from narrowly defined economics represents one of the major differences from the traditionalists.

that false positives, mistakenly identifying violations, are more pernicious than false negatives, failing to identify violations. In other words, except for naked cartel behavior, it is better to leave the market to sort things out.³⁶

In considering digital platforms, the traditionalists focus on the established legal elements. In rigorously defined economic markets, is there a basis for believing that a platform has market power? If so, how did it acquire and maintain it, through appropriate or exclusionary means? And if a digital platform company has market power, is it sustainable, or, alternatively, is there a basis for expecting it to be superseded by others as technology, business models, and consumer preferences evolve? More broadly, is this a winner-take-all circumstance where monopoly is inevitable because of high fixed costs, network effects, or other circumstances? And if it is, would it be better to leave well enough alone because intervention would simply add costs without producing any benefits?

The Brandeisians ask many of the same questions, but they tend to add (or more strongly weight) concerns about the negative externalities that many of the major platforms produce.

[Brandeisians] claim that Google, Amazon, and other giant tech firms are exploiting blatantly anticompetitive practices to block potential rivals—and getting away with it by manipulating the political system. They are particularly worried that current antitrust orthodoxy, which is preoccupied with the issue of harms to consumers, has left the country all but defenseless against bigness’s other ills.³⁷

The willingness to expand the focus of antitrust from narrowly defined (as in price theory) economics represents one of the major differences from the traditionalists. A consequence of this more expansive vision of antitrust law, they are considerably more inclined to recommend intervention and extensive forms of relief.³⁸ In a sense, the insurgents are making a pragmatic argument: the “cash value” of the Chicago School approach hasn’t merely diminished, it has become negative.

The argument is taking place in the usual policy circles: think tanks, universities, and Congress. Although nothing like a consensus about adjusting the approach to most forms of antitrust enforcement has emerged, the distance between the disputants is noticeably narrower in the case of mergers, where there appears to be a recognition that enforcement should be tightened.³⁹ It is important to recognize, however, that the intellectual debate hasn’t produced any change in direction at the ultimate locus of antitrust orthodoxy—the courts and especially the Supreme Court.

Platform Oversight

Unsurprisingly, the intellectual argument very often has centered on the issues presented by the major digital platforms. And in the specific case of the digital platforms, it has moved beyond the academy. This has been apparent in the Eu-

36 For influential statements to that effect, see Robert Bork, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, BASIC BOOKS, INC. (1978) and Frank Easterbook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

37 Lamoreaux, *supra* note 31, at 94 (citations omitted).

38 For an influential expression of these views, see Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).

The major platforms recently have become subject to government antitrust scrutiny on an unprecedented level.

European Union for several years.⁴⁰ In the United States, notwithstanding Chicago orthodoxy, the major platforms recently have become subject to government antitrust scrutiny on an unprecedented level. The heads of the federal antitrust agencies repeatedly have indicated that the antitrust laws are sufficiently flexible to address the competitive issues implicated by the major platforms. They have articulated the view that the “consumer welfare standard” that constitutes the prevailing approach to interpreting and enforcing the antitrust laws is not limited to structure and conduct producing price effects. Rather, they have defended the view that considerations of quality and innovation, among other things, have an important place.⁴¹ If not a departure from the orthodoxy of the last forty years, it is something of a change in emphasis.

Well before the end of 2019, the Antitrust Division had acknowledged a formal investigation of Google; the FTC had undertaken a similar investigation of Facebook; a very broad coalition of State Attorneys General had announced investigations of both; and a Committee of the House of Representatives had sent sweeping document requests to Google, Facebook, Amazon, and Apple. In addition, very unusually, the U.S. Attorney General and Deputy Attorney General had indicated a broad investigation into digital platforms, including but going beyond Google and Facebook. And in early 2020, the FTC announced that it had initiated a detailed

³⁹ This recognition isn’t limited to the United States. *See* FURMAN UK REPORT, *supra* note 22, at 6, 11–12:

[H]istorically there has been little scrutiny and no blocking of an acquisition by the major digital platforms. This suggests that previous practice has not had any ‘false positives’, blocking mergers that should have been allowed, while it may well have had ‘false negatives’, approving mergers that should not have been allowed. ... Acquisitions have included buying businesses that could have become competitors to the acquiring company (for example Facebook’s acquisition of Instagram), businesses that have given a platform a strong position in a related market (for example Google’s acquisition of DoubleClick, the advertising technology business), and data-driven businesses in related markets which may cement the acquirer’s strong position in both markets (Google/YouTube, Facebook/WhatsApp). Over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinised by competition authorities. (footnote omitted)

⁴⁰ *See, e.g.*, European Commission Decision of 27 June 2017, Case AT. 39740 Google Search Shopping; European Commission Decision of 18 June 2018; Case AT. 40099 Google Android; European Commission Decision of 20 Mar. 2019, Case AT. 40411 Google AdSense. Each of these decisions is subject to judicial review.

⁴¹ *See, e.g.*, Jeffrey A. Rosen, Deputy Attorney General, Remarks, Free State Foundation, Washington, DC, (Mar. 3, 2020); Makan Delrahim, *All Roads Lead to Rome: Enforcing the Consumer Welfare Standard in Digital Media Markets*, (remarks at Jevons Colloquium, Rome, Italy) (May 22, 2018); and Makan Delrahim, ‘...And Justice for All’: *Antitrust Enforcement and Digital Gatekeepers*, (speech at Antitrust New Frontiers Conference, Tel Aviv, Israel) (June 11, 2019):

Price effects alone do not provide a complete picture of market dynamics, especially in digital markets in which the profit-maximizing price is zero. As the journalist Franklin Foer recently said, “Who can complain about the price that Google is charging you? Or who can complain about Amazon’s prices; they are simply lower than the competition’s.” Harm to innovation is also an important dimension of competition that can have far-reaching effects. Consider, for example, a product that never reaches the market or is withdrawn from the market due to an unlawful acquisition. The antitrust laws should protect the competition that would be lost in that scenario as well.

A successful competitive milieu would require extensive government intervention.

Section 6(b) study of every acquisition, no matter how small, undertaken by five of the major platform companies since 2010.⁴²

Remedial Proposals

In addition to the prosecutorial exercises, there have been the previously noted studies and recommendations.⁴³ Their conclusions have converged on critical points: network effects and single homing, high fixed costs, and enormous and constantly growing data accumulations. All of these make successful commercial challenges (and even the threat of challenges) to the major digital platforms implausible. For example, the Stigler Report concluded:

Economies of scale, economies of scope, network effects, and negligible marginal cost all work together to make entry difficult in existing markets. Moreover, while monopoly profits are a lure to competitors, incumbents can use those very profits to entrench themselves and protect their position. No matter how dynamic the technology, an entrant will not unseat a monopolist if the monopolist is permitted to buy the dynamic entrant for a share of monopoly profits. Both parties gain from such a transaction—and the public loses.

The result is less entry than a more competitive environment would create. Less entry into digital markets means fewer choices for consumers, stunted development of alternative paths of innovation, higher prices, and lower quality. Self-correction is not a realistic expectation in this environment—indeed, the available evidence suggests it has not happened—and public policy should not rely exclusively on it. Effective antitrust enforcement and regulation must take account of this reality. If there is a force toward self-correction, it may require active promotion to succeed, and in this way public intervention can be complementary rather than antagonistic to market forces. Indeed, the other reports that have addressed this problem around the world have accepted that policy changes are necessary in order to avoid stagnant and harmful digital markets.⁴⁴

In consequence, these studies generally conclude that a successful competitive milieu would require extensive government intervention.⁴⁵

Several significant intimations involving focus and scope have emerged in the course of the federal digital platform investigations. The Assistant Attorney General in charge of the Antitrust Division has suggested the possibility that search

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

43 See *supra* note 22.

44 STIGLER ANTITRUST REPORT, *supra* note 12, at 59–60.

45 *Id.* at 21:

The United Kingdom, the European Commission, Australia, and Germany have all published reports concluding that digital platforms' market power has indeed become entrenched. Surmounting the existing barriers to entry created by consumer behavior, cost structure, public policy, and any past anticompetitive conduct is extremely difficult. This fact has direct effects on consumers: *without entry or the credible threat of entry, digital platforms need not work hard to serve consumers because they do not risk losing their consumers to a rival.* (footnote omitted, emphasis in original).

The varying outcomes of the lengthy AT&T and Microsoft prosecutions highlight what may be the most significant issue surrounding antitrust enforcement against major digital platforms—identifying proposed remedies that will reliably be more beneficial than harmful.

and social media could be relevant markets for Section 2 purposes;⁴⁶ and he and the Deputy Attorney General have adverted to the possibility that the accumulation of personal data could be the source of market power.⁴⁷ The Chairman of the Federal Trade Commission and the Director of its Bureau of Competition have spoken about the possibility of post-consummation enforcement to undo mergers in the context of the major digital platforms.⁴⁸ Assuming as seems reasonable that these statements describe the direction and expansiveness of the investigations that the respective agencies are undertaking, it seems entirely possible that they will conclude in major enforcement actions.

The various investigations should proceed to their conclusions as rapidly as possible, both out of fairness to the companies and also in light of the serious concerns that the companies' businesses present to society. The outcomes of the investigations could be significant and instructive, all the more so if they result in antitrust prosecutions.

The varying outcomes of the lengthy AT&T and Microsoft prosecutions highlight what may be the most significant issue surrounding antitrust enforcement against major digital platforms—identifying proposed remedies that will reliably be more beneficial than harmful. This is an essential consideration in determining whether to bring suit, and one likely to require as much analysis as the facts and circumstances that would support a finding of liability.⁴⁹

Antitrust policy has long recognized that, everything else equal, structural remedies are preferable to conduct remedies because they alter economic incentives. But, of course, they also pose costs, both in the course of a divestiture, but also potentially in diminishing the defendant's ability to conduct its business efficiently.⁵⁰

⁴⁶ Nihal Krishan, Big Tech Investigation Focused on Abuse of Data, DOJ Antitrust Chief Says, WASHINGTON EXAMINER, (Nov. 26, 2019); Makan Delrahim, '...And Justice for All': Antitrust Enforcement and Digital Gatekeepers, (Speech at Antitrust New Frontiers Conference, Tel Aviv, Israel) (Jun. 11, 2019)

⁴⁷ Makan Delrahim, Blind[ing] Me With Science, Antitrust, Data, and Digital Markets, (Remarks at Harvard Law School & Competition Policy International Conference on "Challenges to Antitrust in a Changing Economy," Cambridge, MA) (Nov. 8, 2019).

⁴⁸ Cecilia Kang and David McCabe, F.T.C. Broadens Review of Tech Giants, Homing In on Their Deals, N.Y. TIMES (Feb. 11, 2020); David McLaughlin, FTC Chief Says He's Willing to Break Up Big Tech Companies, BLOOMBERG (Aug. 13, 2019); Remarks of Ian Conner, Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition, (Remarks at GCR Live 9th Annual Antitrust Law Leaders Forum, Miami Beach) (Feb. 8, 2020).

⁴⁹ Professor Hovenkamp has observed that apart from the AT&T case:

The United States does not have a good track record with enforced breakups for monopolistic practices. Aside from recent mergers, there is no obvious way to break up highly integrated digital platforms without doing serious harm to both consumers and investors. Breaking off individual features simply makes the platform less attractive to users but does little to alleviate monopoly. Any breakup that interferes with economies of scale will result in higher costs and very likely higher prices or decreased product quality. In any event, a breakup proposal must be more than rhetorical flourish. It must be accompanied by specifics showing which assets are to be spun off, as well as well-informed predictions concerning the impact on output, price, or quality.

(Statement of Herbert Hovenkamp, House Judiciary Inquiry into Competition in Digital Markets) (Apr. 17, 2020) (footnote omitted), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3183&context=faculty_scholarship

There are very significant practical obstacles associated with a court's requiring an entity with market power to deal with its competitors.

In the case of the major platforms, there are obvious divestiture candidates in the event that liability is established. Separating Google and YouTube or Facebook and Instagram would create some additional horizontal competition in the targeted advertising marketplace. In addition to horizontal divestitures, the possibility of requiring the divestiture of Google's ad tech business in whole or in part—for example, DoubleClick or AdMob—presumably would be studied.

Less drastic remedies, with concomitant less risk of imposing disproportionate costs, in the form of conduct remedies, also would be available (although structural and conduct remedies are not mutually exclusive, as the AT&T experience illustrates). The kinds of remedies suggested by the European Union's prosecutions—duties to deal and prohibitions on discrimination—could be imposed, although necessarily with substantial continuing requirements on the part of the government to contend with ambiguities and to monitor and police evasion.

The Essential Facilities Debate

To be sure, there are very significant practical obstacles associated with a court's requiring an entity with market power to deal with its competitors—to offer access to essential assets or services—on reasonable terms and conditions and to refrain from discrimination. Foremost among them is the ongoing requirement to determine what constitutes reasonable terms and conditions. And there is a very substantial question about whether courts rather than specialized regulatory agencies are equipped to deal with access remedies.

One area where regulatory agencies undoubtedly possess superior competence over antitrust courts is in the area of managing complex access arrangements. In the few cases where courts have waded into such matters, the experiment underscored that courts are not well-suited to manage such administration. . . . As Judge Easterbrook put it, courts are inherently ill-suited for such a role both because they lack the ability to gather, and the expertise to process, the necessary information and because they do not face a reward structure that holds them accountable for the results of their quasi-regulatory efforts.⁵¹

⁵⁰ See, e.g., Peter Alexiadis and Alexandre de Streel, *Designing an EU Intervention Standard for Digital Platforms*, European University Institute, Robert Schuman Centre for Advanced Studies, Florence School of Regulation (2020) at 39–40:

We take the view that a remedy of structural or functional separation should not be adopted because many of the benefits and efficiencies generated by digital platforms might be lost if their businesses were to be separated. Structural separation should only be imposed in very exceptional circumstances when the digital platform in question is very mature (in terms of the business model used and the acceptance of consumers of that model), demonstrates persistent indications of market failure, and behavioural remedies under ex post and ex ante disciplines have been demonstrated to be ineffective over a relevant period of time. Therefore, behavioural remedies imposed under competition law enforcement which can be effected in a timely manner or (when competition law is not sufficiently effective) under regulation should be preferred.

https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y

⁵¹ Philip Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTI-TRUST BULL. 549, 559–60 (2005).

Notwithstanding these practical difficulties, as Professor Weiser observed, anti-trust remedies of this sort have been imposed. The Supreme Court’s 1912 decision in *Terminal Railroad*, involving access to a railroad bridge across the Mississippi River by competing railroads, established that the Sherman Act required monopolists to provide access to their “essential facilities” on reasonable terms and conditions.⁵² This requirement was applied in various circumstances over the next several decades, most notably by the Supreme Court to newspaper wire services in *Associated Press*⁵³ and to electric power transmission in *Otter Tail Power*⁵⁴ and by the 7th Circuit to telecommunications in *MCI*.⁵⁵ Times have changed. The present state of affairs has been summarized in this fashion:

*To describe the doctrine as controversial is a gross understatement; indeed, commentary on the nature of the doctrine often bears an uncanny resemblance to theological debate. Disagreement exists on almost every key issue including whether the doctrine exists at all (thus far the US Supreme Court has professed its agnosticism).*⁵⁶

Justice Scalia’s opinion for the Supreme Court in *Trinko*⁵⁷ contains extensive dicta in support of Chicago School orthodoxy, and in the process sets forth a perspective on the existence and availability of an essential facilities-based duty to deal. The *Trinko* majority leaves the clear impression that it is a bad idea. “Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”⁵⁸ There is very little reason to believe that the majority of today’s Supreme Court justices would disagree, with important implications for the availability of essential facilities remedies applicable to the major digital platforms. “If the Supreme Court applies *Trinko* broadly to the tech titans, then separate regulation might be needed to impose on the tech titans mandated interconnection or data sharing with rivals.”⁵⁹

Perhaps the most influential academic criticism of the essential facilities doctrine was that of Professor Areeda, one of the most important antitrust scholars of the latter half of the twentieth century.⁶⁰ But his criticism was qualified. The presence of a regulatory agency to relieve the courts of what he saw as an inappropriate supervisory obligation could make a difference:

52 *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912).

53 *Associated Press v. United States*, 326 U.S. 1 (1945).

54 *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

55 *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

56 Thomas Cotter, *The Essential Facilities Doctrine*, *Encyclopedia of Law and Economics*, Ch. 7 (2008).

57 *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-11 (2004).

58 *Id.* at 408. Then-Chief Judge Breyer’s very influential *Town of Concord v. Boston Edison Co.* decision considers the difficulties confronting courts in supervising activities more conventionally assigned to regulatory agencies, citing among others, 3 *Areeda & Turner* 701, at 148-50 (“The courts correctly regard as uncongenial and foreign to the Sherman Act the burden of continuously supervising economic performance.”). 915 F.2d 17, 25 (1st Cir. 1990).

59 Shapiro, *supra* note 26, at 83.

60 Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *ANTI-TRUST L. J.* 841 (1990).

It would be a serious mistake to rely on antitrust enforcement as the sole mechanism for securing our society's interest in the workings of the ever more critical digital platforms.

*No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedial by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency. Remedies may be practical when (a) admission to a consortium is at stake, especially at the outset, (b) divestiture is otherwise appropriate and effective, or (c) as in *Otter Tail*, a regulatory agency already exists to control the terms of dealing.⁶¹*

This perspective--that the appropriateness and practical feasibility of judicial impositions in the nature of essential facilities remedies where a regulatory agency is available to oversee the inevitable complexities of price and other terms and condition--is shared by scholars more sympathetic to the doctrine.⁶²

Supplementing Antitrust

As the preceding discussion indicates, it would be a serious mistake to rely on antitrust enforcement as the sole mechanism for securing our society's interest in the workings of the ever more critical digital platforms. Taken alone, the antitrust laws are not likely to produce a satisfactory response to perceived requirements for additional social controls applicable to the major digital platforms. The cases take too long to litigate, the outcomes inevitably are uncertain, and the remedial possibilities—whether structural or behavioral—will be complex.

This assessment changes, however, in the presence of a specialized regulatory agency. Given proper authority, a specialized agency would be able to regulate non-discrimination, access to data sets, interoperation, and similar requirements designed to lower barriers to competition with the major platforms, whether judicially imposed or agency imposed. The contingent and protracted nature of antitrust litigation would remain as obstacles to its utility as a sole source of social control, but the remedial complications could be ameliorated very substantially.

As is apparent, however, the better course involves empowering a new, specialized agency to address in practical and timely fashion both the symptoms and the causes of platform-related problems that require remediation. The agency's statutory mandate should take care not to displace the antitrust laws explicitly or by implication. Rather, the agency should be given powers that supplement and complement the Justice Department's and the Federal Trade Commission's competition and consumer protection mandates.

⁶¹ *Id.* at 853. (emphasis supplied)

⁶² *See, e.g.,* Spencer Waller, Areeda, *Epithets, and Essential Facilities*, WISC. L. REV. 359 (2008); Philip J. Weiser, *Goldwasser, the Telecom Act, and Reflections on Antitrust Remedies*, 55 AD-MIN. L. REV. 1 (2003); STIGLER ANTITRUST REPORT, *supra* note 12, at 78–80.