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ARTICLE

Antitrust at a Crossroads:
The Challenge of Digital Platforms

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INTRODUCTION

For a field written off for dead not long ago,¹ antitrust law has made a

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¹ Stigler Center, *Judge Richard A. Posner in Conversation with Professor Luigi*

stirring comeback, driven largely by concerns about digital platforms. One of the major drivers of this renaissance has been the three landmark cases brought by the European Commission (EC) against Google that resulted in €8 billion in fines, the largest competition law penalties in history.² The EC has also fined Apple €1.8 billion for abusing its dominant position over the distribution of streaming apps³ and accepted commitments to settle the Apple Pay proceeding.⁴ In addition, the EC resolved two major competition law cases against Amazon with commitments⁵ and opened a competition law case against Meta's Facebook Marketplace.⁶

Similar litigation is taking place in the United States. For example, the Department of Justice (DOJ) has two ongoing antitrust cases against Google, one focusing on its search practices, whose verdict is expected this summer,⁷ and the other focusing on its advertising technology,⁸ as well as a case against Apple.⁹ The Federal Trade Commission (FTC) is pursuing antitrust

Zingales, YOUTUBE, at 05:20 (Mar. 28, 2017), https://www.youtube.com/watch?v=JRCm_gJ2EOk (asserting, somewhat jokingly, "Antitrust is dead, isn't it?").

² Case T-612/17 Google LLC v Commission, ECLI:EU:T:2021:763 (Nov. 10, 2021) (upholding fine of €2.4 billion), *appeal pending*, Case C-48/22 P, 2022 O.J. (C 191) 10 (filed Apr. 22, 2022); Case T-604/18, Google LLC v. Commission, ECLI:EU:T:2022:541 (Sept. 14, 2022) (upholding adjusted fine of €4.1 billion), *appeal pending*, Case C-738/22 P, 2023 O.J. (C 83) 11 (filed Nov. 30, 2022); Case AT.40411, Google Search (AdSense), Commission Decision, (Mar. 20, 2019), https://ec.europa.eu/competition/antitrust/cases/dec_docs/40411/40411_1619_11.pdf (imposing fine of €1.5 billion), *appeal pending*, Case T-334/19, Google LLC v. Commission, 2020 O.J. (C 255) 46 (filed June 14, 2019).

³ Case AT.40437, Apple – App Store practices (music streaming), Commission Decision, https://ec.europa.eu/competition/antitrust/cases1/202419/AT_40437_10026012_3547_4.pdf (Mar. 4, 2024) (provisional non-confidential version) (imposing fine of €1.8 billion).

⁴ European Commission Press Release IP/24/3706, Commission Accepts Commitments by Apple Opening Access to 'Tap and Go' Technology on iPhones (July 11, 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3706.

⁵ Cases AT.40462, Amazon Marketplace, and AT.40703, Amazon Buy Box, Commission Decision (Dec. 20, 2022), https://ec.europa.eu/competition/antitrust/cases1/202310/AT_40703_8990760_1533_5.pdf.

⁶ European Commission Press Release IP/22/7728, Antitrust: Commission Sends Statement of Objections to Meta Over Abusive Practices Benefiting Facebook Marketplace (Dec. 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728.

⁷ See *United States v. Google LLC (Search)*, 687 F. Supp. 3d 48 (D.D.C. 2023) (granting motions for summary judgment in part and denying them in part).

⁸ See *United States v. Google LLC*, 692 F. Supp. 3d 583 (E.D. Va. 2023) (dismissing two affirmative defenses).

⁹ *United States v. Apple Inc.*, No. 2:24-cv-04055 (D.N.J. filed Mar. 21, 2024).

enforcement actions against Amazon and Facebook.¹⁰ State attorneys general are participating in the federal suits as well as filing their own actions based on state antitrust laws.¹¹ Enforcement officials' recent attempts to prevent digital platforms from acquiring other companies have proven unsuccessful.¹²

In addition to litigation, jurisdictions around the world have enacted new legislation to govern the conduct of digital platforms. In September 2022, the European Union enacted the Digital Markets Act (DMA), which imposes new regulatory obligations on companies providing "core platform services."¹³ In May 2024, the UK enacted the Digital Markets, Competition and Consumers Act (DMCCA), which took a different approach to regulating digital markets based around firm-specific codes of conduct.¹⁴ Japan has enacted legislation that follows Europe's lead only for mobile operating systems.¹⁵ The amendments adopted by Germany have made more minor adjustments that remain within the traditional competition law paradigm.¹⁶ The U.S. Congress has considered similar measures since 2021¹⁷ but now

¹⁰ *FTC v. Amazon.com Inc.*, No. 2:23-cv-01495-JHC (W.D. Wash. filed Sept. 26, 2023); *FTC v. Facebook Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022).

¹¹ Rebecca Klar, *How State Attorneys General Are Leading the Fight Against Big Tech*, THE HILL (Sept. 17, 2022), <https://thehill.com/policy/technology/3646920-how-state-attorneys-general-are-leading-the-fight-against-big-tech/>.

¹² *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023).

¹³ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265).

¹⁴ Digital Markets, Competition and Consumers Act, 2024, c.13 (Eng.), <https://www.legislation.gov.uk/ukpga/2024/13/enacted>.

¹⁵ Specified Smartphone Software Competition Promotion Act, Law No. 58 of 2024.

¹⁶ § 19a GWB, available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html.

¹⁷ Randy Picker, *The House's Recent Spate of Antitrust Bills Would Change Big Tech as We Know It*, PROMARKET (June 29, 2021), <https://www.promarket.org/2021/06/29/house-antitrust-bills-big-tech-apple-preinstallation/>; Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021, 3:49 PM), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/>; Cecilia Kang & David McCabe, *House Lawmakers Are Considering 6 Bills Aimed at Big Tech*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/23/technology/big-tech-antitrust-bills.html>; Press Release, Sen. Amy Klobuchar, Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation to Boost Competition and Rein in Big Tech (June 15, 2023), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=CDEAE124-CA63-446E-AC24-BB2EF170B542>.

appears unlikely to adopt them.¹⁸

At the same time, antitrust is also being revitalized by the emergence of new conceptual frameworks. Since the *Microsoft* cases,¹⁹ competition law analyses of digital markets have relied heavily on the concept of network effects, which arise when value is determined by the total number of users participating in the network.²⁰ Network effects theory has been augmented by the concept of two-sided markets, featured in the U.S. Supreme Court's 2018 *Amex* decision,²¹ which exist when a network consists of two different classes of actors and the value of the network to one class depends on the number of users on the other class.²² Classic examples include credit cards (in which the value of the network to cardholders depends on the number of merchants that accept the card and vice versa), videogame systems (in which the value of the system to game developers increases with the number of gamers using the same system), and advertising networks (in which the value of the network to advertisers depends on the number of viewers).²³ And even newer theories of liability are being proposed, such as the concept of ecosystems.²⁴

New approaches have led some enforcement officials to ask courts to rethink their approach to remedies. Notably, the FTC is seeking to require Meta (formerly named Facebook, Inc.) to divest its prior acquisitions of Instagram and WhatsApp.²⁵ Proposed legislation would prohibit self-

¹⁸ Emily Birnbaum & Maria Curi, *Big Tech Antitrust Push in Congress Is Blunted by GOP-Led House*, BLOOMBERG (Jan. 27, 2023, 1:40 PM EST), <https://www.bloomberg.com/news/articles/2023-01-27/house-republicans-pivot-away-from-big-tech-antitrust-crackdown>; Steven Pearlstein, *Here's the Inside Story of How Congress Failed to Rein Big Tech*, WASH. POST (July 6, 2023), <https://www.washingtonpost.com/opinions/2023/07/06/congress-facebook-google-amazon-apple-regulation-failure/>.

¹⁹ *United States v. Microsoft Corp.*, 253 F.3d 34, 49-50 (D.C. Cir. 2001).

²⁰ See Christopher S. Yoo, *Network Effects in Action*, in GAI REPORT ON THE DIGITAL ECONOMY 159 (Douglas H. Ginsburg & Joshua D. Wright eds., 2020), <https://gaidigitalreport.com/wp-content/uploads/2020/11/Yoo-Network-Effects-in-Action.pdf>.

²¹ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

²² Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003).

²³ Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645, 645 (2005).

²⁴ See, e.g., Michael G. Jacobides & Ioannis Lianos, *Ecosystems and Competition Law in Theory and Practice*, 30 INDUS. & CORP. CHANGE 1199 (2021).

²⁵ See *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022) (denying defendant's motion to dismiss).

preferencing even in the absence of any showing of anticompetitive effects or market power.²⁶

A large number of studies and reports have attempted to uncover the dynamics that characterize digital markets.²⁷ Scholars, lawmakers, economists, lawyers, and tech-companies globally are debating on how best to address all the challenges that an increasingly digital economy is posing for more than a decade. For instance, the University of Pennsylvania hosted the Economics of Digital Services (EODS), a three-year initiative to unlock the complexity of digital markets by building interdisciplinary teams of scholars worldwide.²⁸

In summary, the unique challenges posed by an increasingly digital economy have placed antitrust at a crossroads. To explore this and the future of antitrust in the digital economy, the University of Pennsylvania Carey Law School's *Journal of Law & Innovation* devoted its 2024 symposium to the topic of "Antitrust at a Crossroads: The Challenge of Digital Platforms." This conference brought together many of the world's leading antitrust scholars to investigate concerns and propose solutions on a variety of issues, ranging from antitrust regulation and remedies to the potential role of the U.S. states and the FTC in guiding competition in the digital economy. The articles in this volume contribute to one of the most important debates currently confronting antitrust.

I. NEW THEORIES OF LIABILITY

The first question we should ask is whether the advent of the digital economy requires the development of new analytical frameworks and tools. Market definition is fundamental in antitrust analysis, and Professor Daniel Crane's paper identifies three ways in which digital markets present novel questions of market definition.²⁹ First, Crane notes that traditionally, market

²⁶ American Innovation and Choice Online Act, S. 2033, 118th Cong. (2023); *see also*, Herbert Hovenkamp, *Antitrust and Self-Preferencing*, ANTITRUST, Fall 2023, at 5, 8-11 (criticizing the proposed legislation).

²⁷ *See* Filippo Lancieri & Patricia Morita Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 STAN. J.L. BUS. & FIN. 65, 95 (2021).

²⁸ *Economics of Digital Services*, PENN CAREY LAW, <https://www.law.upenn.edu/digitaleconomics/> (last visited May 31, 2024).

²⁹ Daniel A. Crane, *Defining Relevant Markets in Digital Ecosystems*, 7 J.L. & INNOVATION 10 (2024).

definition focuses on the substitutability of two products or geographies. But the substitutability of products in digital markets might be very difficult to assess considering competition between firms that compete with each other on only one side of a two-sided market.³⁰ Second, he discusses ecosystem competition, albeit in a different manner than the rivalry among communities of collaborating firms providing complementary goods and services structured in specific, nongeneric ways used in the economic literature.³¹ Instead, similar to how firms in a vertical chain production enjoy the most success when the services they provide are differentiated while those provided by other firms are commoditized, Crane's version of ecosystem competition focuses on how firms work to ensure that the nodes that they occupy in the ecosystem remain differentiated and to turn other nodes into commodities.³² Third, Crane explores the challenges posed by what he calls capacity competition, which arises from attempts to develop new general-purpose technologies that do not yet have clearly identifiable use cases, such as AI and robotics, among others.³³ Such new forms of non-horizontal competition may require a new analytical toolkit that departs from traditional approaches to defining markets.³⁴

Daniel Sokol and Bo Zhou take a more congenial view of antitrust oversight of digital markets.³⁵ Although many reasons to regulate exist, only two focus on the competition concerns that lay at the core of antitrust: addressing market failures and ensuring fair competition.³⁶ They then explore some of the nuances in defining markets, identifying market power, and in evaluating consumer effects in the context of digital platforms.³⁷ More fundamentally, they ask what competition problem that new approaches, such as the DMA, are trying to solve, exploring such possibilities as ecosystems theories of harm, conglomerate effects, vertical integration, data, entrenchment, and the potential superiority of sector specific regulation.³⁸

³⁰ *Id.* at 13-16.

³¹ See, e.g., Michael G. Jacobides & Ioannis Lianos, *Ecosystems and Competition Law in Theory and Practice*, 30 INDUS. & CORP. CHANGE 1199 (2021).

³² Crane, *supra* note 29, at 16-21.

³³ *Id.* at 21-25.

³⁴ *Id.* at 25-26.

³⁵ D. Daniel Sokol & Bo Zhou, *Antitrust Regulation*, 7 J.L. & INNOVATION 27 (2024).

³⁶ *Id.* at 28-37.

³⁷ *Id.* at 37-44.

³⁸ *Id.* at 44-54.

II. REMEDIES

The increase in the number of antitrust proceedings against digital platforms raises the fundamental question of what remedies should be adopted to address the concerns alleged in those cases. Big Tech companies are accused of being too powerful and pervasive in essential markets. Therefore, if the main concern is that Big Tech companies are too big, why don't we simply break them up into pieces?

For many, divestitures seem to be the most logical solution.³⁹ However, the dominant doctrine has warned about the negative consequences that a such a remedy might have for consumers and competition overall. Professor Herbert Hovenkamp's contribution explains why structural remedies in enforcing Section 2 of the Sherman Act are not only uncommon but can also provide a cure that is "worse than the disease."⁴⁰ Network effects can make breakup remedies more difficult to impose in digital markets than in the markets for traditional products, while the nonrivalrous nature of digital assets can make behavioral relief focusing on sharing easier to implement.⁴¹ Hovenkamp then applies this framework to analyze pending cases against Google search and Amazon, asking whether the former is a natural monopoly and exploring the complications resulting from the latter's nature as a venue for selling multiple noncompeting products.⁴² After emphasizing the need to identify anticompetitive conduct as well as large market share, Hovenkamp explores what he calls "quasi-structural" relief, such as mandating interconnection or nonexclusivity.⁴³ In any event, in seeking competition remedies, "courts should always look first to injunctions" and turn to structural remedies only as a last resort.⁴⁴

³⁹ See Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 723, 800 (2017); Sally Lee, *Tim Wu Explains How Big Tech Is Crippling Democracy*, COLUM. MAG. (2019), <https://magazine.columbia.edu/article/how-mega-corporations-are-crippling-democracy>.

⁴⁰ See Herbert Hovenkamp, *Structural Antitrust Relief Against Digital Platforms*, 7 J.L. & INNOVATION 57 (2024).

⁴¹ *Id.* at 74-79.

⁴² *Id.* at 79-94.

⁴³ *Id.* at 91-104.

⁴⁴ *Id.*

III. THE ROLE OF INSTITUTIONS

Rethinking antitrust in the context of digital platforms may also require redefining the role of antitrust institutions. Policymakers must confront the question whether digital platforms need a new regulator or whether existing antitrust enforcers, such as the FTC and State Attorneys General, need more authority. Which institution is best suited to enforce competition in digital platforms? What changes are necessary to make antitrust enforcement more effective from an institutional side?

Professor and former FTC Chair William Kovacic finds the FTC to be well suited to regulating digital platforms.⁴⁵ He identifies two main reasons that make the FTC well-suited as a regulatory body for large information services platforms: one historical and one institutional. First, Congress imbued the FTC with key institutional features needed to address competition policy during the revolution of communications, including the telephone and the radio, energy, and transportation which changed the economic order. Thus, dealing with markets affected by technological changes is in the FTC's DNA.⁴⁶ Second, Section 5 of the FTC Act gave the Commission broad authority in prohibiting "unfair methods of competition,"⁴⁷ which enabled the agency to set binding norms through a case by case approach and tailored regulatory remedies.⁴⁸ The open-ended elasticity of Section 5 was necessary to adapt to new conditions and address companies' attempts to circumvent specific prohibitions covered in Section 5 over time.⁴⁹

The flexibility of Section 5 of the FTC Act enabled the FTC to become the nation's federal consumer protection agency by tackling false or misleading claims about products in an unanticipated manner. According to Kovacic, the reformulated FTC's mandate demonstrated to be scalable as the FTC also became the nation's principal federal privacy authority since the 1990s.⁵⁰ These features make the FTC a promising candidate to lead the future of platform regulation. That said, the FTC may need to receive

⁴⁵ William E. Kovacic, *Adaptable Platform Regulation: The Role of the Federal Trade Commission*, 7 J.L. & INNOVATION 106 (2024).

⁴⁶ *Id.* at 112-16.

⁴⁷ 15 U.S.C. § 45(a).

⁴⁸ See GIOVANNA MASSAROTTO, ANTITRUST SETTLEMENTS: HOW A SIMPLE AGREEMENT CAN DRIVE THE ECONOMY 31 (Kluwer, 2019).

⁴⁹ Kovacic, *supra* note 45, at 113.

⁵⁰ *Id.* at 117.

congressional support and rethink certain aspects of its institutional structure if it is to play this role effectively.⁵¹

Another critical point in applying antitrust to digital platforms concerns the role of the states. Professor Babette Boliek's paper recognizes that antitrust law clearly envisions that states will enforce the federal statute and may well enact legislation of its own, but doing so can raise lead to divergence in procedure, venue, and substance.⁵² She then reviews pending proposals in New York, California, and other states that may well have national impact.⁵³

CONCLUSION

In summary, digital platforms are forcing antitrust to confront challenges that are diverse and unique. The Articles in this volume offer invaluable insights for responsible and effective antitrust enforcement in an increasingly digital economy. We and all the participants of the symposium are immensely grateful to the Center for Technology, Innovation & Competition for making the symposium and the *Journal of Law & Innovation* possible through its steady support.

⁵¹ *Id.* at 128-33.

⁵² Babette Boliek, *The State and Antitrust Law*, 7 J.L. & INNOVATION 134, 141-52 (2024).

⁵³ *Id.* at 153-58.