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Global Innovation, Local Regulation: Navigating Competition Rules in the Digital Economy

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Digital Platforms: Innovation, Antitrust, Privacy & the Internet of Things

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I. Introduction

Good morning. I'm delighted to speak to you today. Thank you to Professor Lim for your welcome remarks and kind introduction, and to the University for putting together this terrific event. Before I begin in earnest, I must give the standard disclaimer that the views I will share today are my own and do not necessarily reflect the views of the Federal Trade Commission or of any other Commissioner.

I am disappointed that I cannot be with you in person, but I commend the conference organizers for their prudent determination to move the conference fully online due to coronavirus concerns. But even speaking to you remotely, it is a great pleasure to be part of this event. The agenda touches on so many of the issues that are at the forefront of the FTC's work today. I am especially happy to talk about these issues with an audience in the Midwest because technology is relevant to all companies, not just those on the coasts. I recognize that every company in the Midwest worries every day about the policy dictates issuing from Washington, DC. But my message to you today is that to fully understand potential regulatory challenges, you must think globally, too.

There are meaningful differences among international competition regimes, reflecting differences in culture, value systems, political structures, history, and policy objectives. This has always been so – but we have worked hard over many years to unify the regulatory approach and work towards convergence. We have achieved a lot of success, one painstaking step at a time, in developing a critical international consensus: that the North Star that guides competition enforcement should be consumer welfare. That consensus is foundational to a consistent, predictable set of rules for multinational businesses who want to serve customers around the globe.

Today, I am concerned that the progress we have made over the years may be at risk. Through the International Competition Network, the OECD's Competition Committee, and other international fora, the U.S and other key competition enforcers have long argued that the consumer welfare standard and sound economics should underlie everything we do. But in recent years, we have heard increasing references to "fairness" and other non-competition goals from antitrust enforcers. This focus on extraneous goals, including fairness – a "flexible concept"[1] without a universal definition, especially in the competition context[2] – has arisen at a pivotal moment of increasing clamor about the appropriate scope and scale of antitrust enforcement, particularly in the technology sector.

In some ways we are in a new world. Technology has reshaped our daily lives and the global economy. Perhaps this transformation is most notable with respect to digital platforms. These businesses, and the products and services they offer, transcend geography in ways we never could have imagined decades ago. The dreamers and doers behind these companies have

[1] Contribution from Greece to the Global Forum on Competition, How Can Competition Contribute To Fairer Societies? (Nov. 29, 2018), https://one.oecd.org/document/DAF/COMP/GF/WD(2018)1/en/pdf.
[2] OECD, Global Forum on Competition (Nov. 29, 2018), http://oecd.org/competition/globalforum/how-can-competition-contribute-to-fairer-societies.htm.

connected us to our neighbors – whether next door or oceans away – in ways that have made our lives richer, giving us access to products and experiences that we didn't even know we wanted.

But for all the positive ways that digital platforms have transformed our lives – and for all of the innovations they have made possible – they are not exempt from the antitrust laws. They must compete on the merits, and regulators must take them to task when they stray from the path of honest competition. This mission is all the more important as platforms gain scale and even dominance. Big is not bad – but the bigger you are, the more consumers may suffer when you break the rules. In this important way, the world has not changed at all. Today as before, the touchstone of competition regulators must be consumer welfare.

This is why I want you all to think globally. As regulators around the world grapple with the sometimes – but not always – novel issues posed by digital platforms, there are some who argue that we should reinvent the wheel of competition regulation, seeking to embed new policy objectives into the antitrust analysis. Political pressure has driven much of this advocacy, presented as a push for more aggressive enforcement.

But this so-called "aggressive enforcement" does more harm than good if it distorts what competition enforcement has set out to do. If competition authorities overseas are receptive to populist clamoring, it amplifies the same rhetoric here in the United States. And today I am here to issue a warning – the consequences will be severe if we veer off course.

Our learnings and guiding principles are woven into the fabric of competition enforcement around the world. If we allow novel analytical approaches and policy goals to reshape competition policy as it applies to the platforms, we start to unravel both warp and weft. If we apply new enforcement approaches to platforms, why not to other industries? If we let competition enforcement be guided by, for example, privacy and data protection objectives, why not other policy goals too?

But there is reason for hope. We are equipped to take on the challenges raised by digital platforms – and we do so, aggressively – without abandoning antitrust fundamentals. We will continue to collaborate with our colleagues across the globe and demonstrate that the competition enforcement tools we have developed together are up to the task of protecting consumers and competition in today's dynamic and innovative marketplace.

Today I want to share with you a few examples where competition authorities around the world have undertaken notable initiatives in the tech sector. I will also discuss how U.S. regulators would treat each of these examples, given our laws and analytical frameworks in the United States. And I will highlight how even the best intentioned of these initiatives may allow the camel's nose into the tent – and the stakes of reshaping antitrust policy in this way. These examples focus on digital platforms, but their effects extend beyond the platform players. Ultimately, erosion of the international consensus has the potential to chill innovation and unmoor enforcement from a focus on consumer welfare, with ripple effects encompassing every industry in every part of the world.

Throughout my remarks, I speak with the greatest respect for our fellow competition authorities, and with appreciation both for the hard work they have poured into developing global best practices for antitrust enforcement and for the many competing pressures they face in their respective jurisdictions today.

II. Foreign Initiatives

a. Facebook (Germany)

In July 2019, the German competition authority Bundeskartellamt ("BKA") imposed on Facebook "far-reaching restrictions in the processing of user data."[3] The BKA took issue with Facebook's collection, integration, and usage of user data from Facebook-owned platforms (including Messenger, WhatsApp, and Instagram) and other sites – for example, data collected when Facebook users visited third-party websites that used Facebook APIs to incorporate "Like" or "Share" buttons.

The BKA found Facebook to be a dominant platform, and observed that the use of Facebook was conditioned on users' agreement to terms of service that allow Facebook to collect and commingle data from Facebook and non-Facebook sources. In finding Facebook liable for abuse of dominance, the BKA concluded that these terms of service, "being a manifestation of market power," violated the EU's General Data Protection Regulation ("GDPR") and were abusive (as exploitative business terms) under German competition law.[4]

"But wait a moment," you may say to yourself. "Isn't GDPR the General *Data Protection* Regulation, not a competition regulation?" And you are correct. In its decision, the BKA invoked not only GDPR, but also a German constitutional right to informational self-determination.[5] The issuance of this enforcement decision prompted a wave of commentary on the seeming conflation of privacy objectives with a competition law framework.[6]

As I have said many times, privacy protection is a laudable and necessary policy objective. I feel blessed to sit on the Federal Trade Commission with its dual and discrete missions of Competition and Consumer Protection. The objectives of consumer protection

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[3] Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

[4] Bundeskartellamt, *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[5] *Id.*

[6] *See, e.g.*, Maureen K. Ohlhausen, *Privacy and Competition: Friends, Foes, or Frenemies?*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Feb. 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/02/CPI-Ohlhausen.pdf; Geoffrey Manne, *Doing Double Damage: The German Competition Authority's Facebook Decision Manages to Undermine Both Antitrust and Data Protection Law*, TRUTH ON THE MARKET (Feb. 8, 2019), https://truthonthemarket.com/2019/02/08/doing-double-damage-bundeskartellamt-facebook/; Justus Haucap, *Data Protection and Antitrust: New Types of Abuse Cases? An Economist's View in Light of the German Facebook Decision*, COMPETITION POL'Y INT'L ANTITRUST CHRON. (Feb. 2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/02/CPI-Haucap.pdf.

policy – particularly privacy policy – and of competition policy are equally near and dear to me. And it is precisely because I so passionately believe in the importance of each of these norms that I am so insistent that they be maintained and prioritized as distinct. As vitally important as consumer privacy is, it nonetheless should not steer the ship of competition policy.

Instead, privacy deserves its own vessel, its own definitive standards and tools, free from the domain of competition analysis. This is why I have consistently called for comprehensive privacy legislation here in the United States, and why I will continue to advocate for it until our representatives in Congress get it done.[7] But it is not just the importance of privacy that justifies the separation between the privacy and competition policy apparatus.

Here in the United States, privacy and competition have long existed as separate policy spheres. To understand the reasons why this is so, a brief look at the history of the FTC's enforcement authority is instructive. I commend to you an excellent article by former FTC Commissioner Maureen Ohlhausen and newly appointed Deputy Assistant Attorney General Alex Okuliar that discusses this history. As their article observes, the FTC's antitrust and consumer protection authorities are based upon separate statutory provisions, enacted at different times and for different reasons.[8] Today, those laws are enforced by different bureaus within the FTC: the Bureau of Competition for antitrust and the Bureau of Consumer Protection for privacy and data security.

Competition law in the United States developed around concerns about large "trusts" and their ability to overcharge consumers. These concerns spurred the enactment of the Sherman Act, and later the FTC Act and the Clayton Act.[9] Although these competition rules are statutory, their underlying framework dates back to common law limitations upon restraints of trade.

U.S. privacy protections developed much differently. The U.S. Constitution created a right to be free from certain kinds of unreasonable governmental intrusions.[10] In the late 18th century, the federal government prohibited opening someone else's mail.[11] In the late 19th

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[7] *See, e.g.*, Christine S. Wilson, Oral Statement as Prepared for Delivery Before the U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423979/commissioner_wilson_nov_2018_testimony.pdf; Christine S. Wilson, Why We Should All Play By the Same Antitrust Rules, from Big Tech to Small Business, Address at the American Enterprise Institute (May 4, 2019), https://www.ftc.gov/system/ files/documents/public_statements/1527497/wilson_remarks_aei_5-4-19.pdf; Christine S. Wilson, Oral Statement as Prepared for Delivery Before the U.S. House of Representatives Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf; Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum (Feb. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf.

[8] *See* Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and The Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 138-150 (2015).

[9] *See* 15 U.S.C. §§ 1, 2, 7, 45.

[10] *E.g.*, U.S. CONST. amend. IV.

[11] *See* Daniel J. Solove, *A Brief History of Information Privacy Law*, in PROSKAUER ON PRIVACY § 1:3.1[B] (PLI Treatise 2006).

century, state courts recognized a limited common law right to privacy under state tort laws.[12] This change was an answer to new products and technology that created new privacy challenges (sound familiar?): the rise of portable cameras and gossip newspapers.[13] Privacy laws have continued to emerge, with sector-specific statutes such as the Fair Credit Reporting Act (credit bureau data), HIPAA (health data), COPPA (children's data), and others. And, of course, we also have the Federal Trade Commission Act. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce,"[14] and has been used to bring many privacy and data security cases.

All this is to say that in the United States, we have many tools to address privacy as a policy objective on a standalone basis, obviating any need to weave it into the competition framework. That is true in Europe as well, which is why the BKA decision surprised many commentators. In fact, in its decision on the merger of Facebook and WhatsApp in 2014, the European Commission explicitly noted that "privacy-related concerns […] do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."[15] Those rules now are embodied principally within GDPR.[16] Shortly after the BKA Facebook decision, then-EC Commissioner for Competition Margrethe Vestager, in responding to a question from Parliament about the case, explained that the "European legislator has made sure that the type of conduct in question is addressed by the General Data Protection Regulation."[17]

Now, to be sure, privacy protections can be an important non-price dimension of competition. In those instances, it is entirely appropriate for regulators to evaluate harm to competition through the lens of diminished privacy protection, just as we consider other forms of non-price competition. (Lest you doubt that our antitrust tools allow us to give due consideration to these non-price factors, I recall an important case from my last stint at the Federal Trade Commission. In 2007, the Commission remedied the merger of Evanston and Highland Park hospitals[18] – just a few miles up the road from Professor Lim in Chicago – in part because that merger harmed competition on factors such as quality of care and hospital amenities.)

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[12] *See, e.g.*, John M. Sharp, CREDIT REPORTING AND PRIVACY 52-53 (1970).
[13] *See* Ohlhausen & Okuliar, *supra* note 7, at 125.
[14] 15 U.S.C. § 45(a)(1).
[15] European Commission, Decision of 3 Oct. 2014, Case M.7217 Facebook/WhatsApp, ¶ 164, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.
[16] European Commission, Commission Regulation 2016/679, General Data Protection Regulation, 2016 O.J. (L119). GDPR's reason for being is, in the words of one observer, "Europe's effort to operationalize its fundamental right to privacy." Geoffrey Manne, *Doing Double Damage: The German Competition Authority's Facebook Decision Manages to Undermine Both Antitrust and Data Protection Law*, TRUTH ON THE MARKET (Feb. 8, 2019), https://truthonthemarket.com/2019/02/08/doing-double-damage-bundeskartellamt-facebook/.
[17] European Commission, Answer Given by Ms. Vestager on Behalf of the European Commission, Question Reference P-001183/2019 (May 8, 2019), https://www.europarl.europa.eu/doceo/document/P-8-2019-001183-ASW_EN.html; *see also* Wouter P.J. Wils, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*, CONCURRENCES 3-2019 (June 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424592.
[18] Press Release, Fed. Trade Comm'n, FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporation's Acquisition of Highland Park Hospital (Apr. 28, 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftc-issues-final-opinion-and-order-restore-competition-lost; *see also* Press Release, Fed. Trade Comm'n, FTC Commissioners Unanimously Find that Consummated Merger of Microprocessor Prosthetic Knee Companies Was Anticompetitive; Assets Must Be Unwound (Nov. 6, 2019),

But back to Germany: in the Facebook case, privacy was not a component of competition. Indeed, it could not have been, as the BKA found Facebook to be an effective monopolist in a "private social network" market that included Facebook but excluded other social networks like Twitter, Instagram, Snapchat, LinkedIn, and Pinterest.[19] In a market thus defined, Facebook was found to be dominant, making it subject to "special obligations under competition law."[20] Actions that might be considered benign by a non-dominant market participant can be condemned when executed by a dominant firm.

That is true in the United States as well, where our monopolization matters typically require a finding of market power. But here, the second element of the inquiry requires a showing of real harm to consumers or competition. In other words, sound analysis of consumer welfare rules the day.

To be clear, the German analysis did not ignore the question of effects altogether – but the required proof of effects is less rigorous when the conduct in question is undertaken by a dominant firm. In the Facebook matter, this approach essentially allowed the BKA to collapse the questions of dominance and harm. In effect, the BKA decision found Facebook's terms of service to be an abuse of dominance because (a) they were a breach of privacy law, and (b) they were imposed by a dominant firm. Commentators were troubled by the seeming absence of consideration given by the BKA to whether the terms resulted in harm to competition or consumers.[21]

For this reason, the German appeals court suspended the BKA decision in August 2019.[22] In its decision, the appellate tribunal in Düsseldorf held that abuse of dominance requires anticompetitive conduct causally linked to the firm's dominance[23] – in other words, that the

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https://www.ftc.gov/news-events/press-releases/2019/11/ftc-commissioners-unanimously-find-consummated-merger; Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.

[19] Bundeskartellamt, *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[20] Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/ 07_02_2019_Facebook.html.

[21] *See, e.g.*, Geoffrey Manne, *Doing Double Damage: The German Competition Authority's Facebook Decision Manages to Undermine Both Antitrust and Data Protection Law*, TRUTH ON THE MARKET (Feb. 8, 2019), https://truthonthemarket.com/2019/02/08/doing-double-damage-bundeskartellamt-facebook/ ("Under [the BKA's] interpretation, in certain circumstances . . . the mere collection of data would be tantamount to a new antitrust infringement, irrespective of any analysis (let alone evidence) of anticompetitive harm. This zealous antitrust invention impairs both legal certainty and the effectiveness of the FCO's existential goal: i.e., tackling evidenced anticompetitive harms.").

[22] *See* Sara Germano, *Facebook Wins Appeal Against German Data-Collection Ban*, WALL ST. J. (Aug. 26, 2019), https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967.

[23] *See* Dina Jubrail et al., *The Higher Regional Court of Düsseldorf Suspends an Order of the German Competition Authority on an Alleged Abuse of Dominance in the Social Networks (Facebook)*, CONCURRENCES E-COMPETITIONS (Aug. 2019), https://www.concurrences.com/pdf_version.api/article-92044.pdf; Charley Connor, *Facebook Data*

firm's market power allowed it to take action that harms competition or the development of competition.

In reversing the BKA decision, the appeals court[24] found no indication that Facebook's data practices caused harm to competition.[25] To the contrary, the BKA's decision acknowledges "the internet's innovative power[.]"[26] But some commentators have observed that the BKA's approach could undermine that innovative power. In the words of Geoffrey Manne, "[W]rapping up data protection and privacy concerns inside an antitrust package leads to bad public policy that undermines the incentive for firms to innovate and aggressively compete, while simultaneously doing little to protect the reasonable privacy expectations of consumers."[27] If the remedy imposed here – in effect, "an internal divestiture of Facebook's data"[28] – diminishes the value of Facebook's advertising offerings, it may alter Facebook's economic considerations around investing in the consumer-facing platform and in the APIs that allow users to carry the features they like from Facebook through to content hosted outside of the Facebook ecosystem.

The antitrust laws are designed to address anticompetitive conduct; absent such conduct, they are not the right tool to protect the legitimate and important privacy rights and expectations of consumers. Insisting on the proper tool does not devalue those rights and expectations; rather, it elevates them. In the United States, in keeping with our history, we will continue to enforce and uphold those privacy rights and expectations under our general consumer protection authority, and soon, I hope, pursuant to comprehensive privacy legislation.

b. Platform Guidelines (Japan)

Just a few days after the Düsseldorf court suspended the BKA decision, another competition authority signaled an interest in commingling competition and privacy objectives. On August 29, 2019, the Japan Fair Trade Commission ("JFTC") issued a request for public comment on its draft Guidelines Concerning Abuse of a Superior Bargaining Position In Transactions Between Digital Platform Operators and Consumers that Provide Personal Information, Etc. ("Platform Guidelines").[29] The Sections of Antitrust Law and International

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Decision Struck Down by German Court, GLOB. COMPETITION REV. (Aug. 27, 2019) https://globalcompetitionreview.com/article/1196690/facebook-data-decision-struck-down-by-german-court.

[24] The BKA has appealed the decision of the Düsseldorf court.

[25] *See* Dina Jubrail et al., *The Higher Regional Court of Düsseldorf Suspends an Order of the German Competition Authority on an Alleged Abuse of Dominance in the Social Networks (Facebook)*, CONCURRENCES E-COMPETITIONS (Aug. 2019), https://www.concurrences.com/pdf_version.api/article-92044.pdf.

[26] Bundeskartellamt, *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

[27] *See* Sara Germano, *Facebook Wins Appeal Against German Data-Collection Ban*, WALL ST. J. (Aug. 26, 2019), https://www.wsj.com/articles/facebook-wins-appeal-against-german-data-collection-ban-11566835967.

[28] Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

[29] Press Release, Japan Fair Trade Comm'n, Request for Public Comments on Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platformer

Law of the American Bar Association ("ABA") submitted comments (the "ABA Comment") on the draft Platform Guidelines, as did the International Bar Association.[30] Staff of the Federal Trade Commission also submitted a joint comment with the Department of Justice.

As I discuss below, the Platform Guidelines adapt an already imperfect tool in service of a new and unrelated objective: privacy. But as some commenters observed, the Platform Guidelines are too narrow as a privacy policy statement;[31] they limit privacy concerns only to the digital platform context, and only to dealings with firms with a superior bargaining position.

The Platform Guidelines took effect in December 2019.[32] They rely on the provision in Japan's Antimonopoly Act addressing Abuse of Superior Bargaining Position ("ASBP"), one of a number of "unfair trade practices" listed in the Act, to reach concerns about treatment of personal data by digital platforms. In so doing, they prompt a number of intriguing questions, to which we now turn.

By way of background, ASBP is one flavor of dominant firm antitrust enforcement, less common than the more prevalent monopolization and abuse of dominance frameworks.[33] ASBP violations generally require a finding first of a superior bargaining position, and second, of abusive conduct.[34] In most jurisdictions that have established ASBP as an antitrust violation,

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Operators and Consumers that Provide Personal Information, Etc. (Aug. 29, 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.html.

[30] Section of Antitrust Law and Section of Int'l Law of the ABA, Comments of the American Bar Association Antitrust Law Section And International Law Section on the Japan Fair Trade Commission Draft Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions Between Digital Platform Operators and Consumers that Provide Personal Information, Etc. (Sept. 27, 2019) ("ABA Comment"), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/aba-sal-sil-comments-on-jftc-draft-platform-abuse-of-superior-bargaining-position-guidelines_final-final-package.pdf (comment submitted on behalf of the author Sections, not on behalf of ABA as a whole); Antitrust Comm. of the Int'l Bar Ass'n, Antitrust Committee of the International Bar Association Unilateral Conduct and Behavioural Issues Working Group Submission in Response to the Japan Fair Trade Commission Draft "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions Between Digital Platform Operators and Consumers that Provide Personal Information" (Sept. 30, 2019) ("IBA Comment"), https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/WorkingGroupSubmissions.aspx#filter=.asiapacific.

[31] *See* Asia Internet Coalition, Comment on Draft Guidelines Concerning Abuse of Superior Bargaining Position in Transactions Between Digital Platform Owners and Consumers (Sept. 30, 2019) ("AIC Comment"), https://aicasia.org/wp-content/uploads/2019/10/AIC_%E5%84%AA%E8%B6%8A%E7%9A%84%E5%9C%B0%E4%BD%8DGL%E3%81%B8%E3%81%AE%E6%84%8F%E8%A6%8B-1.pdf ("Given the importance of personal data and privacy protection, laws and regulations which protect privacy and personal data should apply across the board, not just [be] limited to transactions with digital platforms.").

[32] Press Release, Japan Fair Trade Comm'n, Release of the "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, Etc." (Dec. 17, 2019), https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217_DP.html.

[33] Int'l Competition Network Task Force for Abuse of Superior Bargaining Position, *Report on Abuse of Superior Bargaining Position* (2008) ("Report on Abuse of Superior Bargaining Position"), https://centrocedec.files.wordpress.com/2015/07/abuse-of-superior-bargaining-position-2008.pdf (In ICN survey, 24 of 32 respondent jurisdictions did not recognize ASBP as autonomous legal concept).

[34] *See generally id*.

proving ASBP does not require a showing of anticompetitive effects.[35] In Japan, for example, it is not necessary to demonstrate effects on competition (including harm to consumer welfare) to prove ASBP.[36]

The Platform Guidelines break new ground in more ways than one. In addition to debuting the application of this aspect of Japan's Antimonopoly Act to the privacy sphere, the Platform Guidelines apply a framework that traditionally has been reserved for business-to-business ("B2B") negotiations rather than business-to-consumer ("B2C") "bargaining" over terms of service.[37] The ABA Comment voiced concerns that the Platform Guidelines "seek to apply concepts from the B2B context that are ill-suited to the B2C context."[38]

The ABA Comment further noted that this expansion of unfair trade practices concepts "from B2B relationships to also include B2C relationships may be inconsistent with ASBP law, both in Japan and internationally"[39] and may hinder, rather than protect, competition by generating significant uncertainty. Specifically, as the ABA Comment explained, "some concepts developed in the B2B context may be difficult to apply in the B2C context. In particular, the question of what constitutes a 'superior bargaining position' in a B2C relationship is not well developed, whereas a 'dominant market position' is both understood and applied widely."[40]

Under the Platform Guidelines, digital platforms are deemed to have a superior bargaining position *vis a vis* consumers when consumers "suffer detrimental treatment"[41] with respect to personal data, but are compelled to accept those terms in order to use the platform's services. In evaluating whether consumers are indeed compelled, the Platform Guidelines consider "the necessity to trade with" the platform.[42] This consideration largely focuses on the availability of alternative digital platforms and the ability of consumers to switch among them – which commenters note effectively designates any digital platform offering something new, innovative, or "sticky" as possessing a superior bargaining position.[43] The ABA Comment opines, "Digital platform operators should not be presumed to enjoy a superior bargaining position simply because they have a unique product or a product that some consumers desire, or prefer over alternatives."[44] If such a presumption is applied, it may prohibit consumers themselves from evaluating whether the tools and services offered by platform-based innovators

[35] *Id.* at 22-23. Among seven respondent jurisdictions with specific ASBP provisions, only one – Germany – requires establishing some form of anticompetitive effect.
[36] Report on Abuse of Superior Bargaining Position at 22-23.
[37] ABA Comment at 2-4.
[38] *Id*. at 2.
[39] *Id.*
[40] *Id*. at 4.
[41] Japan Fair Trade Comm'n, Draft Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, Etc. (Aug. 29, 2019) ("Platform Guidelines") at 3(1), https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829rev.pdf.
[42] *Id.* at 3(2).
[43] ABA Comment at 5.
[44] *Id*. at 4.

are worth the price of data sharing.[45] As the International Bar Association suggested in its comment, the Platform Guidelines' requirements "could significantly hinder product improvements and innovation led by digital platforms."[46]

Under the Platform Guidelines, once a superior bargaining position is established, abuse of that position may include "unjustifiable" acquisition or use of personal data.[47] The Platform Guidelines offer several categories of abuse, including acquiring information without stating the purpose of use, acquiring information from outside the platform, or "other digital platform operators' conduct[] – related to acquiring or using personal information . . . which unjustifiably causes a disadvantage for consumers in light of normal business practices."[48]

As commenters observed, several operative concepts in the Platform Guidelines are ambiguous or not defined.[49] Notably, as the ABA Comment explains, the Platform Guidelines do not define "detrimental treatment" but instead appear to presume its existence from the mere fact of collecting user data in exchange for the use of a digital platform's service[50] – the very exchange that has rendered many platform-based innovations possible in the first place.[51]

Nor do the Platform Guidelines define what constitutes an "unjustifiable disadvantage."[52] Instead, the question of detrimental treatment collapses in on the question of unjustifiable disadvantage.[53] Thus, where the BKA's Facebook action combined the questions of dominance and harm, the Platform Guidelines essentially do the same with the questions of superior bargaining position and the abuse thereof.

These challenges are not unique to the digital platform context. The Platform Guidelines "[c]ombine [c]ompetition [l]aw and [c]onsumer [p]rotection [i]ssues"[54] in an ASBP framework. No matter the industry, that framework founders if it is not grounded in consumer welfare – and an appreciation that innovation is part of the consumer welfare calculation.

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[45] Of course, to make an informed trade-off of this type, consumers must know the kinds of data that will be collected and the uses to which that data will be put. As I have emphasized, given systemic information asymmetries in the privacy arena, in the absence of comprehensive federal privacy legislation, U.S. consumers may not currently be equipped to make this trade-off on an informed basis. *See* Christine S. Wilson, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation, Remarks at the Future of Privacy Forum (Feb. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf.

[46] IBA Comment at 4.

[47] Platform Guidelines at 5(1), 5(2).

[48] Platform Guidelines at 5(1), 5(2); *see* Dan Matsuda et al., *Japan Fair Trade Commission Published the Draft Guidelines Concerning Abuse of a Superior Bargaining Position of Digital Platformer Operators to Protect Consumers' Personal Information*, DLA Piper Insights (Oct. 1, 2019), https://www.dlapiper.com/en/uk/insights/publications/2019/10/japan-fair-trade-commission-published-the-draft-guidelines/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration.

[49] ABA Comment at 7; AIC Comment.

[50] ABA Comment at 9.

[51] *Id*. at 5.

[52] *Id*. at 4.

[53] *Id*. at 5.

[54] *Id*. at 3.

But critics of the ASBP paradigm raise other significant concerns, as well.[55] Chief among these is a concern with intervening in contracts among private parties.[56] This is certainly true of the U.S. antitrust enforcement apparatus, which "is not concerned with particular outcomes of contractual negotiations between parties unless such terms would have the effect of harming the competitive process and thereby reduce consumer welfare."[57]

In a market economy that seeks to maximize efficiency, as a general rule, parties must be free to negotiate how they will allocate risks, duties, rights, and benefits in private contracts. In the United States, antitrust enforcers refrain from routinely inserting themselves into negotiations[58] so as to avoid chilling the contracting process or, after striking offending provisions *ex post*, leaving behind a deal too lopsided to survive. Prudent enforcement must not focus on the market share of the contracting parties without regard for harm to competition, lest we rob consumers of the benefits of unique, innovative, or simply superior suppliers.

Of course, where an imbalance in bargaining power allows the imposition of terms that harm competition, we do intervene. For example, in 2016, the FTC secured a settlement with Victrex, a dominant manufacturer of plastics used for spinal implants and other medical devices.[59] The Commission's complaint alleged that Victrex had imposed long-term exclusivity and inventory buyback provisions on its customers that, when coupled with regulatory barriers to switching, precluded entry of new suppliers.[60] In that case, the Commission found reason to believe that Victrex's dominant position had allowed it to demand these contract terms from its customers. But the inquiry did not stop there. The Commission's enforcement action depended on careful investigation of the actual impact of these provisions on customers and on the marketplace: the higher prices, diminished supply security, and actual foreclosure of aspiring rivals.[61]

Without a rigorous examination of competitive effect, well-intentioned antitrust enforcement can distort market outcomes to consumers' disadvantage. By requiring a showing of harm, the U.S. monopolization framework maintains its focus on consumer welfare in all its multi-dimensional glory.

c. The Lessons of Uber and Protectionist Policies

The examples I have discussed so far illustrate that we do a disservice to both privacy and antitrust policy objectives when we try to bend competition law to achieve consumer protection ends. But privacy is just one of many "public interest" or, sometimes, "national interest"

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[55] *See* Report on Abuse of Superior Bargaining Position at 16-18.
[56] *See id*. at 35.
[57] *Id*. at 17.
[58] *See* IBA Comment at 2-3.
[59] In the Matter of Victrex plc, et al., Docket No. C-4586 (July 13, 2016), https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter.
[60] Complaint at ¶¶ 24-27, 32, 45-46, In the Matter of Victrex plc, et al., Docket No. C-4586 (July 13, 2016), https://www.ftc.gov/system/files/documents/cases/160714victrexcmpt.pdf.
[61] *Id*. at ¶¶ 42-46.

considerations that jurisdictions around the world have debated incorporating into their review of mergers and competitive conduct.[62]

Some of these national interests and objectives may be salutary – or at least benign – from a consumer welfare perspective, at both the domestic and international levels. But others are more concerning. For example, despite the long-established consensus that competition law must advance the interests of consumers rather than industrial engineering and national champion goals, those once-eschewed policies[63] are now commonly discussed in competition law circles.

This trend is concerning. It is of paramount importance that consumer welfare continue to be the lodestar of competition analysis. A global marketplace requires a level playing field, and antitrust law should not become a tool to orchestrate national interest outcomes at the expense of consumer benefit.

For this reason, "national interest" factors are not part of the analysis for federal or state competition authorities in the United States.[64] But U.S. companies in all industries must nonetheless be aware of these national interest considerations. In 2019, the National Interest Task Force of the ABA Antitrust Law Section issued a report ("National Interest Report") studying the incorporation of national interest considerations into merger and conduct reviews.

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[62] American Bar Ass'n Antitrust Law Section, Report of the Task Force on National Interest and Competition Law (Sept. 1, 2019) ("National Interest Report") at 3, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/ comments/october-2019/report-antitrust-law-section-national-interest-task-force-report-10112019.pdf (Other "national interest" considerations include: job creation and preservation, ensuring domestic control over key industries, preserving small businesses, providing preferential treatment to national champions, limiting the political power of the business community, and combating inequality.).

[63] *See, e.g.*, OECD, Policy Roundtables: Competition Policy, Industrial Policy and National Champions (2009) at 14-15, http://www.oecd.org/daf/competition/44548025.pdf ("One of the main challenges currently facing those governments adopting emergency measures to deal with the impact of the crisis on the real economy relates to the issue of national champions. In dealing with the current crisis one should never lose sight of the underlying principles of sound competition, and in particular one should be conscious of the major drawbacks in this context of an industrial policy that encourages the creation and maintenance of national champions. Empirical evidence suggests that the case in favour of national champions is weak."); Deborah Platt Majoras, National Champions: I Don't Even Think It Sounds Good, Remarks at International Competition Conference/EU Competition Day (Mar. 26, 2007) at 4, http://www.ikk2007.de/seiten/Majoras_en.pdf ("Thus, a national champion policy, by its very design, does not benefit consumers. Instead, it replaces domestic competition with a monopoly firm sheltered by the government to be a bulwark against foreign firms in both domestic and international markets. Consumers lose twice, through higher domestic prices and reduced imports."); Int'l Competition Pol'y Advisory Comm., Final Report to the Attorney General and Assistant Attorney General For Antitrust (2000) at 62-63, https://www.justice.gov/atr/ chapter-2 ("Nations should apply their laws in a nondiscriminatory manner and without reference to firms' nationalities. In particular, nations should agree that competition enforcement efforts will not be targeted toward foreign firms for the purpose of protecting domestic firms or industries from competition. Further, nations should agree to refrain from using national champion policies to protect domestic firms or industries from foreign competition. Nations should neither enforce their competition laws nor withhold enforcement of their competition laws to further the interests of a national champion."); Int'l Competition Network, Guiding Principles for Procedural Fairness in Competition Agency Enforcement (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf ("Agencies should not discriminate on the basis of nationality in their enforcement.").

[64] National Interest Report at 7-8.

The National Interest Report concluded that "although a number of leading economies take public interest considerations into account in reviewing mergers and competitive practices, no two approaches are identical. This presents . . . a challenging dilemma for practitioners seeking to navigate a deal or practices through the requirements of each jurisdiction that may have an interest."[65]

Some recent developments suggest a heartening movement away from a home-court advantage in competition policy. A 2014 U.S. Chamber of Commerce report[66] observed that China's Anti-Monopoly Law remedies often appeared designed to advance industrial policy and boost national champions.[67] According to the South China Morning Post,

> The law has previously been criticised for targeting foreign companies partly because almost all merger and acquisition cases that the Ministry of Commerce banned or approved with extra conditions were related to foreign companies. This inevitably led to speculation that the authorities were applying different standards, including unconditionally approving cases such as mergers launched by state-owned enterprises.[68]

Early this year, China released an early draft of amendments to its Anti-Monopoly Law, which were reportedly designed to "creat[e] a better business environment for private and foreign businesses . . . ."[69] The revision process is at an early stage. But if the amendments achieve this goal, it will be, to me, an encouraging development.

And yet, in other corners of the world, the call for consideration of national interest factors has been growing. Last month, political leaders from France, Germany, Poland, and Italy wrote to newly-promoted European Commission Executive Vice President Margrethe Vestager to call for a "greater collegiality in the assessment of the EU's long-term industrial challenges" when evaluating competition policy and enforcement.[70] More directly, they wrote, "[T]he nature of global competition has changed. European companies now have to compete with foreign companies that sometimes benefit from substantial state support or from protected domestic markets."[71] The Member State ministers urged "more justified and reasonable flexibility" in

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[65] *Id*. at 8.
[66] U.S. Chamber of Commerce, Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy (Sept. 7, 2014) at i, https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.
[67] *Id*. at ii.
[68] Sidney Leng, *China's Updated Anti-Monopoly Law Aimed at Further Protecting Foreign Firms Criticised for not Doing Enough*, SOUTH CHINA MORNING POST (Jan. 9, 2020), https://www.scmp.com/economy/china-economy/article/3045224/chinas-updated-anti-monopoly-law-aimed-further-protecting.
[69] *Id*.
[70] Letter from Economy Minister Peter Altmaier et al. to Executive Vice President Margrethe Vestager (Feb. 4, 2020), https://www.politico.eu/wp-content/uploads/2020/02/Letter-to-Vestager.pdf.
[71] *Id.*

assessing mergers and defining relevant markets[72] – in sum, asking the EC to prioritize European champions in competition policy.[73]

The Ministers' letter provides a glimpse into conversations that are happening in enforcement regimes around the world. On a recent trip abroad, I spoke with colleagues at a foreign competition authority. These fellow competition enforcers told me of the widespread concerns in their jurisdiction about the increasing prominence of foreign platforms in their local economy. These platform players, they told me, have extensive infrastructure that allows them to do business at much lower cost than local brick-and-mortar retailers, who have trouble competing effectively with the high-tech platforms.

Of course, the lower cost structures decried by my foreign colleagues flow from economies of scale and scope. Consumers reap the benefits of these efficient business models in the form of lower prices. And yet, these colleagues told me, as concern deepens at the local level, they have established a goal to maintain a set proportion of sales for local brick-and-mortar firms versus online platform players. These enforcers were principally focused on the impact of these foreign companies on their brick-and-mortar marketplaces, which are struggling to compete. In the United States, our principal focus is the effect on consumers, who are paying lower prices. And these different approaches lead to different outcomes.

On my trip overseas, my foreign colleagues explained to me that one tool they had considered leveraging against the more efficient platforms was predatory pricing enforcement. Under U.S. law, predatory pricing challenges are extremely rare. This outcome should be unsurprising in the context of the consumer welfare standard, as low prices generally benefit consumers with certainty and immediacy, and the possibility that competitors will fail is typically remote and speculative. To prove predatory pricing, U.S. law requires a showing of a dangerous probability that the predatory firm will recoup its "investment in below cost prices"[74] by driving out other competitors.

But in other jurisdictions, particularly when other policy objectives cloud the inquiry, this effects test may be less rigorous.[75] False positives in this context can lead to concrete competitive harm by punishing firms for pricing too low, chilling incentives to offer economically rational discounts. While less efficient rivals may benefit, it is consumers who will suffer.

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[72] *Id.*

[73] *But see* Letter from Enterprise Minister Ibrahim Baylan et al. to Executive Vice President Margrethe Vestager (Mar. 10, 2020), https://www.regeringen.se/493e14/globalassets/regeringen/dokument/naringsdepartementet/letter-to-executive-vice-president-margrethe-vestager---10-march-2020.pdf (on behalf of Ministers from Sweden, Czechia, Estonia, Finland, Ireland, Latvia, Lithuania, and the Netherlands, stating, "[I]t is important that any review of Europe's competition rules . . . is based on proven principles, evidence and economic research, in order to avoid inflicting harm on consumers, SMEs and the Single Market. Any moves to soften and politicize EU competition rules would be detrimental for the whole European Union.").

[74] Brooke Group, Ltd. v. Brown & Williamson Tobacco Corporation, 509 U.S. 209, 224 (1993).

[75] *See generally* OECD, Rethinking Antitrust Tools for Multi-Sided Platforms (2018) at 112-113, https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf.

Moreover, a predatory pricing framework is poorly suited to the innovative, often multi-sided, business models at issue in many digital platform markets, especially those subject to indirect network effects. In many platform markets, products may be offered for free on one side of the platform in order to drive adoption or participation that makes another, often more remunerative, side of the platform more attractive.[76] If they fail to account for incentives around multiple user groups, predatory pricing challenges – and other antitrust enforcement efforts –may destroy nascent platforms, preventing them from ever achieving efficient scale to serve customers.

Take the example of Uber's global expansion. Uber's ride-hailing platform has transformed how we navigate the world – both day-to-day in our hometowns and cities and as we travel across the globe. Uber's innovative business model has made exploring new places accessible and affordable, and has made people safer as they get around the places they live. In Colombia, for example, Uber has gained popularity in cities where high crime rates have made hailing a taxi a dangerous proposition.[77] But around the world, and in U.S. localities as well, the company has faced significant regulatory challenges, some clothed in competition policy. Uber was ordered to shut down its operations in Colombia last month after a competing taxi company accused Uber of operating without meeting the requirements for public transportation companies.[78] Against a backdrop of conflicting regulatory views on the legality of ride-hailing apps,[79] Colombia's Superintendency of Industry and Commerce found that Uber had violated competition rules.[80] Uber has since re-launched in Colombia with a slightly updated service model,[81] but its future is uncertain.

AirBnb has fought similar battles around the country and across the globe, many sparked by complaints from entrenched local rivals. In some jurisdictions, it has effectively been blocked from the market, depriving consumers of an important, innovative, and attractive alternative to traditional lodging. As antitrust regulators, when we encounter new products that are changing the landscape, we must resist the temptation to declare a state of crisis, to heed the populist clamoring to act first and ask questions later. In today's dynamic markets, abandoning our antitrust principles can cause real harm. If we act more quickly than we can think, we fail to consider the crucial question: how is the consumer served by this action?

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[76] *See generally id.*
[77] Matthew Bristow and Oscar Medina, *Uber to Quit Colombia After Judge Says it Doesn't Compete Fairly*, BLOOMBERG (Jan. 10, 2020), https://www.bloomberg.com/news/articles/2020-01-10/uber-to-quit-colombia-after-judge-says-it-doesn-t-compete-fairly.
[78] *Uber Returns to Colombia Less Than a Month After Exit*, REUTERS (Feb. 20, 2020), https://www.reuters.com/article/us-uber-colombia/uber-returns-to-colombia-less-than-a-month-after-exit-idUSKBN20E2JE.
[79] *Colombia Orders Uber to Cease Ride-Hailing, Cites Competition Rules Violation*, REUTERS (Dec. 20, 2019), https://www.reuters.com/article/us-colombia-uber/colombia-orders-uber-to-cease-ride-hailing-cites-competition-rules-violation-idUSKBN1YP00R.
[80] Matthew Bristow and Oscar Medina, *Uber to Quit Colombia After Judge Says it Doesn't Compete Fairly*, BLOOMBERG (Jan. 10, 2020), https://www.bloomberg.com/news/articles/2020-01-10/uber-to-quit-colombia-after-judge-says-it-doesn-t-compete-fairly.
[81] *Uber Returns to Colombia Less Than a Month After Exit*, REUTERS (Feb. 20, 2020), https://www.reuters.com/article/us-uber-colombia/uber-returns-to-colombia-less-than-a-month-after-exit-idUSKBN20E2JE.

III. Effective Enforcement Need Not Stifle Innovation

Many of those who have pushed to incorporate other policy objectives into the competition agenda, whether overtly or discreetly, have argued that this expanded concept of competition is necessary for effective enforcement. But an insistence on consumer welfare principles does not make U.S. antitrust enforcement lax, weak, or feckless – no matter what you have read on Twitter.

In the platform context or otherwise, where conduct is clearly anticompetitive, we challenge it. But those challenges are guided by an understanding of consumer welfare and the importance of preserving incentives to innovate. For example, FTC staff are currently in the midst of a lawsuit against Surescripts, an e-prescription platform that connects pharmacists, pharmacy benefit managers, and health care providers. The Commission's complaint alleges that Surescripts employed anticompetitive exclusivity agreements, threats, loyalty discounts, and other exclusionary tactics to prevent its customers from using competing platforms, thereby preventing aspiring rivals from challenging its dominance as a near-monopolist.[82] This egregious conduct had no legitimate business justification, and was not reasonably necessary to reduce prices or increase output.[83] The result has been the exclusion of competitors, higher prices, and reduced innovation, as Surescripts has stymied the efforts of innovative entrants to grow by preventing its customers from multi-homing.[84]

And last December, the Commission leveraged Section 2 to challenge an anticompetitive acquisition. Illumina sought to buy out its nascent rival, Pacific Biosciences of California ("PacBio"), in an attempt to maintain its monopoly in the market for next-generation DNA sequencing. PacBio's recent innovations had created more accurate, efficient, and inexpensive DNA sequencing systems, threatening Illumina as the incumbent monopolist.[85] In challenging the proposed transaction, the Commission alleged that Illumina had become "increasingly concerned" as PacBio continually improved its sequencing offerings.[86] Although Illumina internally debated offering discounts or developing new innovations to compete with PacBio, it ultimately decided to pursue an acquisition strategy that would have extinguished all present and future competition between the two – including competition to innovate and develop new products.[87] The Commission's complaint pled a violation of Section 7 of the Clayton Act – the traditional provision for merger enforcement. But it also included a monopolization count under Section 2 of the Sherman Act, alleging that the proposed acquisition was anticompetitive conduct reasonably capable of contributing significantly to Illumina's monopoly maintenance.[88] This

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[82] Complaint at ¶ 2, Fed. Trade Comm'n v. Surescripts, LLC, No. 1:19-cv-01080-JDB (D.D.C. Apr. 17, 2019), https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf.
[83] *Id*. at ¶¶ 216-221.
[84] *E.g.*, *id*. at ¶¶ 32, 58, 171.
[85] Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of PacBio (Dec. 17, 2019), https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio.
[86] Complaint at ¶ 58, In the Matter of Illumina, Inc. and Pacific Biosciences of California, Inc., Docket No. 9387 (Dec. 17, 2019) https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.
[87] *Id*. at ¶¶ 63-67, 73.
[88] *Id*. at ¶¶ 81, 83.

Section 2 count was premised not only on the instant acquisition, but also on an allegation that Illumina had a pattern of engaging in exclusionary conduct.[89] Illumina and PacBio abandoned their proposed merger shortly after the Commission issued its complaint.[90]

As these cases demonstrate, although digital platforms and nascent competition raise complex and intriguing issues for antitrust enforcement, we are ready and willing to challenge anticompetitive mergers and conduct in any marketplace. We are serious about intervening – but intervening on an informed basis. That is the motivation for our recently announced 6(b) study of tech platform transactions below the Hart-Scott-Rodino notification threshold. The information gained through the study will bolster the intensive efforts of our new Technology Enforcement Division and equip us for more efficient and effective enforcement in future digital platform matters, both merger and conduct. This information is critical for our efforts to protect American consumers without chilling innovation and competition.

As I wrote in my statement on the issuance of the 6(b) study, the need for informed intervention is not unique to digital platforms, nor to the competition sphere.[91] To be responsible stewards of the economy, we must do all we can to anticipate the full consequences of regulatory action. This counsels a reasoned, educated approach to deploy the time-tested tools of the trade – the antithesis of the crisis mindset and political opportunism that have characterized much of the competition policy rhetoric we have seen of late.

IV. Conclusion

I want to leave you time to ask any questions you may have, but before I do, I want to impress upon you some final thoughts. As pressing as the concerns may be here in the heartland about what Washington regulators will do, there is another realm outside of DC on which to focus. I fear an era of growing divergence among international antitrust regimes if authorities incorporate varied non-competition policy objectives into their analysis. These calls for this multipurpose antitrust have intensified amid today's political discourse around the roles and responsibilities of digital platforms. Political pressure has lent greater urgency to the push – not entirely new – to repurpose competition policy to serve unrelated ends.

But I have faith. I do not believe that U.S. law will head in this direction. To do so would stifle innovation and the robust competition that antitrust as a field exists to protect. As the original crucible of competition policy, the United States has leveraged its extensive experience to develop the best practices and guiding principles that drive our work today. We have committed countless resources to leading the way to ensure that our learnings can inform

[89] *Id*. at ¶ 54.
[90] Press Release, Fed. Trade Comm'n, Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California (Jan. 2, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/statement-gail-levine-deputy-director-ftc-bureau-competition.
[91] Statement of Commissioner Christine S. Wilson Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

market regulators around the globe (and also here at home, where competition advocacy is some of the most important work we do).

We have worked hard to build international consensus on the critical building blocks of antitrust policy. While other jurisdictions may waver, we must resist the urge to wrap those other objectives in the mantle of antitrust — for the good of our own consumers, and to serve as a constant North Star in these tumultuous times. Competition regulation must consistently be grounded in sound economic analysis and guided by concern for consumer welfare.

At the heart of our international efforts is an understanding of the stakes of divergence. The inescapable effect of these policy differences is a patchwork of rules that makes it extraordinarily difficult for multinational firms to make the critical decisions that shape how they go to market, serve customers, and innovate. Ultimately, the most restrictive regimes may be the least common denominator that governs business conduct and innovation.

Although urgent for all international firms, these consequences take on sharper relief in the digital platform context. This heightened impact arises first because in many respects doing business globally as a digital platform should be more efficient than for other industries; and second, because these platforms are some of the most dynamic economic players we've ever seen. They are shaping consumers' lives on a global scale every day, and their impact on the global economy is equally swift. The stakes are high and hindering innovation has real costs for consumers and competition.

In the absence of government-erected barriers to entry, no monopolist is truly safe; each one must keep innovating to preserve its dominance. When monopolists become complacent, they will fall. But they are safer when upstart challengers are too regulated to disrupt. This reality argues for competition policy in all jurisdictions that is grounded steadfastly in sound, effects-based economic analysis – and a consumer welfare standard that puts competition and innovation first.