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WASHINGTON, D.C. 20580

Think Big . . . [Tech]! – Thoughts about the Path Forward for Enforcement
Remarks of FTC Commissioner Rebecca Kelly Slaughter
As Prepared for Delivery

GCR Live 9th Annual Telecoms, Media & Technology Conference
London, UK
March 2, 2020

Introduction

Good afternoon. Thank you to Global Competition Review for inviting me to speak here today.¹ This is an exciting time to be a Commissioner at the Federal Trade Commission, and to be in such good company with the talented leaders and staff of competition authorities here in the UK, the EU, and around the globe.

We gather today at a uniquely challenging and exciting moment for antitrust. We are seeing increasing dominance by large companies across many sectors, including what we generally call “big tech.” At the same time, data-driven technologies are becoming both ubiquitous and indispensable. As a result, we are rightly challenging assumptions about self-correcting markets comprised of rational market participants in favor of serious questions about a state of competition that seems to benefit only a select few.

Studies show increasing concentration in a number of sectors, including in technology markets.² It is unquestionable that high concentration across industries can lead to increased market power within relevant antitrust markets, and this leaves citizens beholden to a few powerful firms, lacking choice in their everyday lives. We all experience that feeling: from our wireless phone

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other commissioner.

² See, e.g., ADIL ABDELA & MARSHALL STEINBAUM, ROOSEVELT INST., THE UNITED STATES HAS A MARKET CONCENTRATION PROBLEM: REVIEWING CONCENTRATION ESTIMATES IN ANTITRUST MARKETS, 2000-PRESENT 1 (Sept. 2018), [ftc-2018-0074-d-0042-155544.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf); *America's Concentration Crisis: An Open Markets Institute Report*, OPEN MKTS. INST. (Nov. 29, 2018), <https://concentrationcrisis.openmarketsinstitute.org>; Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* 1 (Swiss Fin. Inst. Research Paper Series, No. 19-41, 2018), <https://ssrn.com/abstract=2612047> (concluding that, “[i]n the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels” and that concentrated industries have higher profit margins without increased operational efficiency). See generally, Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Statement on *In the Matter of Sycamore Partners, Staples, and Essendant*, Comm’n File No. 181-0180 (Jan. 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf.

service, airlines, healthcare providers, pharmacies, cable service, and even beer; I could go on, as the list is quite long.

When we add in technology-specific issues like data collection, network effects, winner-take-all markets, and the fact that our data, consumer data, has become a commodity itself, the challenges abound. Our obligation as enforcers is to rise to them. We need to think creatively and constructively about how we can use the legal tools we have at our disposal to protect consumers and promote competition. For me, part of that analysis is also thinking about and identifying those areas where those legal tools might be inadequate, and where we might sharpen or change them.

It has been a busy year at the FTC, which is a good thing from my enforcement perspective. In just the last year, we have challenged illegal mergers involving hospitals, chemicals, title insurance, gene sequencing technology, body cameras, breakfast cereal, coal mines, and razors. And most of those challenges were in the last three months, making for a very busy end of 2019 and beginning of 2020. We also brought Section 2 cases against a monopolist in the e-prescription market and against a pharmaceutical company for illegal monopoly maintenance. These enforcement actions protected competition and consumers from bearing the harms of higher prices, lower quality, and lessened innovation that result when markets are not competitive. These cases, along with several others I will discuss today, are not against “big tech” companies. But they implicate antitrust issues and carry important lessons for the questions that arise in the tech context as well. They serve as an important reminder that current antitrust concerns extend well beyond tech specifically and that current antitrust enforcement tools can apply to tech as well.

For today, I want to begin by sharing some general observations about concentration across the economy. Then I want to talk about particular competition questions and challenges posed by tech, including (1) nascent competition; (2) the way platforms and data operate; and (3) the relationship between competition and consumer protection enforcement. Finally, I will conclude by discussing the tools the FTC has in our toolbox for addressing these issues, as well as how we can and should be working with our counterparts in the UK, in Europe, and across the globe as we tackle these difficult questions.

General Observations about Concentration

First, some general observations about concentration in today’s markets. I start with this point because I worry that we risk missing the forest of economy-wide competition problems by myopically focusing on the “big tech” trees.

Recently, the Trump Administration’s Council of Economic Advisers issued a report making what I think is an astounding conclusion about the state of the U.S. economy. The Council concludes that high concentration within industries is not actually indicative of a lack of

competition, and thus is not necessarily harmful.³ I have a very difficult time understanding the logic behind that conclusion. In industry after industry, we see evidence of significant market power held by a smaller and smaller group of firms. As Chief Judge Diane P. Wood of the US Court of Appeals for the Seventh Circuit put it:

One does not have to look far in today's world to find sincere concern over the concentration of economic power in the hands of only a few giant companies, whether they are the tech companies, the energy companies, office retailers, banks, or others. You have only to look at the newsfeed on your cellphone (or if you are really old-fashioned, the TV news) to see people . . . expressing fears that these huge companies are . . . exercising market power[.]⁴

Some examples that have particular salience for me are in the healthcare space. In the pharmaceutical industry about sixty different companies combined down to just ten between 1995 and 2015.⁵ And I continue to have a lot of concern about substantially increasing pharmaceutical prices.⁶ In the last few years, pharmaceutical merger activity has persisted at a high pace,⁷ as have price increases, with one analysis finding thousands of drugs with price hikes at five times the rate of inflation in the beginning of 2019.⁸ Hospital and provider consolidation

³ See COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 199–202 (Feb. 2020), <https://www.courthousenews.com/wp-content/uploads/2020/02/trump-economy.pdf>; see also Ben Remaly, *Trump Economists Reject Rising Concentration as Indicating Lack of Competition*, GLOB. COMPETITION REV. (Feb. 21, 2020), <https://globalcompetitionreview.com/article/usa/1214790/trump-economists-reject-rising-concentration-as-indicating-lack-of-competition>.

⁴ Diane P. Wood, *The Old New (Or is it the New Old) Antitrust: "I'm Not Dead Yet!!"*, 51 LOY. U. CHI. L.J. 1, 4 (2019).

⁵ Margaret Visnji, *Pharma Industry Merger and Acquisition Analysis 1995 to 2015*, REVENUES & PROFITS (Feb. 11, 2019), <https://revenuesandprofits.com/pharma-industry-merger-and-acquisition-analysis-1995-to-2015>; *High Drug Prices and Monopoly*, OPEN MKTS. INST. (last visited Feb. 26, 2020), <https://openmarketsinstitute.org/explainer/high-drug-prices-and-monopoly>.

⁶ See IQVIA INST. FOR HUMAN DATA SCI., *THE GLOBAL USE OF MEDICINE IN 2019 AND OUTLOOK TO 2023* 11 (Jan. 29, 2019), https://www.iqvia.com/-/media/iqvia/pdfs/institute-reports/the-global-use-of-medicine-in-2019-and-outlook-to-2023.pdf?_=1615391600908; IQVIA INST. FOR HUMAN DATA SCI., *MEDICINE USE AND SPENDING IN THE U.S.: A REVIEW OF 2017 AND OUTLOOK TO 2022* 8 (Apr. 19, 2018), https://www.iqvia.com/-/media/iqvia/pdfs/institute-reports/medicine-use-and-spending-in-the-us-a-review-of-2017-and-outlook-to-2022.pdf?_=1615408200525; Laura Entis, *Why Does Medicine Cost So Much? Here's How Drug Prices Are Set*, TIME (Apr. 9, 2019, 10:00 AM), <https://time.com/5564547/drug-prices-medicine/>; see also Joanna Shepherd, *The Prescription for Rising Drug Prices: Competition or Price Controls?*, 27 HEALTH MATRIX 315, 315–16 (2017).

⁷ See Barak Richman, et al., *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOY. U. CHI. L.J. 787, 790–91 (2017); Meagan Parrish, *What's Behind All the M&A Deals in Pharma*, PHARMA MFG. (July 31, 2019), <https://www.pharmamanufacturing.com/articles/2019/whats-behind-all-the-m-and-a-deals-in-pharma/>.

⁸ Aimee Picchi, *Drug Prices in 2019 Are Surging, With Hikes at 5 Times Inflation*, CBS NEWS (Jul. 1, 2019, 11:34 AM), <https://www.cbsnews.com/news/drug-prices-in-2019-are-surging-with-hikes-at-5-times-inflation/>.

has been no different.⁹ The trend that started in the 1990s has continued at a breakneck pace in recent years. Between 2015 and 2018, there were approximately 419 publicly announced hospital consolidations in the U.S.¹⁰ When hospitals consolidate, we know that the price of care goes up, and evidence shows that patient quality of care suffers from the lack of competition.¹¹

The same concerns about high concentration's relationship to market power touch other industries. Take wireless telecoms: by consuming a wide range of smaller, regional carriers like Alltel, MetroPCS, and Nextel, the United States' four top wireless carriers—Verizon, AT&T, T-Mobile, and Sprint—combined to control about 90 percent of the U.S. market.¹² Now those four may be down to three. We can also think about airlines. Over the past decade and a half, mega mergers have left us with only four carriers, which account for 76 percent of all passenger traffic in 2018.¹³ Raise your hand if your customer experience has improved—because that has not been my experience.

Applying Antitrust Principles to Tech

Turning to tech, across different verticals like search, social media, online shopping, cloud storage, and platforms, we see just a few companies—at best—dominating each area. Each of these firms collects and controls vast amounts of data. This concentration and control has obvious antitrust implications that extend beyond academic legal questions to the lived experience of citizens feeling concentration's pinch as both consumers and workers. We cannot ignore that experience; nor can we ignore the empirical evidence that supports it.

Although the focus of my comments today, and of this entire conference, for that matter, is on antitrust authorities addressing outsized power and concentration in the tech industry, I think it important to emphasize what I take away from Chief Judge Wood's statement. That is, antitrust should not, and cannot, just focus on big tech. We have to address competition challenges across the economy, and doing so provides us with the opportunity to apply valuable expertise to the

⁹ See Rebecca Kelly Slaughter, Commissioner, Fed. Trade Comm'n, Antitrust and Health Care Provider Policies to Promote Competition and Protect Patients, Remarks Before the Center for American Progress (May 14, 2019), https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf.

¹⁰ NAT'L INST. FOR HEALTH CARE MGMT. FOUND., HOSPITAL CONSOLIDATION: TRENDS, IMPACTS AND OUTLOOKS 4 (Jan. 2020), <https://www.nihcm.org/categories/hospital-consolidation-trends-impacts-outlook>.

¹¹ See *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets*, Hearing Before the Subcomm. on Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary, 116th Cong. (2019) (statement of Martin Gaynor, E.J. Barone University Professor of Economics and Public Policy, Carnegie Mellon University), <https://docs.house.gov/meetings/JU/JU05/20190307/109024/HHRG-116-JU05-Bio-GaynorM-20190307.pdf>.

¹² Mike Dano, *10 Years of Consolidation in Wireless: The Rise of Verizon, AT&T, T-Mobile and Sprint*, FIERCE WIRELESS (May 26, 2015, 9:23 AM), <https://www.fiercewireless.com/special-report/10-years-consolidation-wireless-rise-verizon-at-t-t-mobile-and-sprint>.

¹³ *Reduced Competition Nudges Airline Fares Higher, Analysis Shows*, NBC NEWS (Jul. 14, 2015, 10:16 AM), <https://www.nbcnews.com/business/travel/reduced-competition-nudges-airline-fares-higher-analysis-shows-n391766>.

issues raised by technology, as well as to contemplate how big tech questions may require new or different tools.

Acquisitions of Nascent Competitors

The first specific issue I want to focus on is the acquisition of nascent competitors. This is an area of particular focus for tech where we are thinking about patterns of acquisitions of smaller companies, particularly those that might have otherwise become a competitive threat. But again, this is not a problem cabined to the tech industry. When a start-up in any industry builds a product that shows signs that it might pose a legitimate threat to an incumbent, the monopolist's all-too-popular response is usually to extinguish that threat by acquiring the smaller, potentially disruptive competitor.

As antitrust enforcers, we must look not only at mergers that might eliminate current competition but also at those that might eliminate potential or future competition. Take the example of an incumbent firm acquiring a small start-up that may only marginally increase the incumbent's market share, but where the start-up poses a significant and meaningful competitive threat. Should we allow the incumbent to gobble up its most serious competition because the change in market share is small? Or should we allow the deal to close because the competitive threat is too uncertain and might consumers and competition benefit from providing the start-up with additional resources?

Antitrust law unequivocally gives us the power and the responsibility to block anticompetitive mergers in their incipiency, without a requirement of showing a certainty of harm. And I'm proud of the recent actions the FTC has taken to challenge acquisitions of nascent competitors.

The first one I'll mention is Illumina/PacBio, which the CMA here in the UK also reviewed. In December 2019, the FTC filed suit to block Illumina, a producer and developer of next-generation gene-sequencing systems, from eliminating via acquisition a nascent competitive threat to its monopoly, Pacific Biosciences ("PacBio").¹⁴ Illumina had a monopoly on the gene-sequencing market, but PacBio was developing and improving its technology and was poised to take an increasing amount of Illumina's market share. What was really interesting about this case is that the Commission alleged not only that the merger violated Section 7 of the Clayton Act, which prohibits mergers that substantially lessen competition, but that it also violated Section 2 of the Sherman Act, which prohibits monopoly maintenance. In other words, the acquisition was not only likely to substantially lessen competition, it was also "anticompetitive conduct reasonably capable of contributing significantly to Illumina's maintenance of monopoly

¹³ See Complaint at 12, Illumina, Inc., Docket No. 9387 (Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf; see also 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>.

power.”¹⁵ The merger was ultimately abandoned in the face of concerns of the FTC and the CMA.

Similarly, in 2018, the FTC challenged, and the parties later abandoned, a merger of a large incumbent and a small nascent competitor in the market for dealer management software used by new car sellers to manage their business.¹⁶ CDK—a large player in the market—proposed acquiring Auto/Mate, a competitor that was still small in terms of market share, but which posed a significant competitive threat to CDK and had been increasingly winning over business through better quality, service, and prices.

These cases illustrate that we can stop dominant firms from squelching their competitors before they have had a chance to pose a more significant threat. They are obviously not in the digital markets as we think of big tech. I understand the concern that the U.S. has not been aggressive enough in blocking acquisitions by dominant firms in the digital space. To address this, it helps to start by identifying two material challenges in the nascent competition space: First, we need to know about an acquisition in order to block it; and second, we need to have the requisite evidence—and three votes on the Commission—to move forward with an enforcement action.

The Commission took an important step last month to address the first challenge: We announced a comprehensive Section 6(b) study which will use compulsory process to analyze patterns and markets more broadly. The authority is not quite as robust as the market-study power that the CMA has, because we cannot use it to order remedies. But it’s a very important information-gathering tool for the FTC. In the 6(b), the Commission unanimously supported studying non-reportable acquisitions by Amazon, Apple, Facebook, Google, and Microsoft.¹⁷ These were acquisitions and transactions that were not large enough to meet the reporting threshold at the time they happened, and therefore were consummated without any ex ante review. This study will help us to understand the patterns of acquisition activity and also help us better understand the sufficiency of the HSR Act in identifying potentially problematic transactions.

On the second point, I appreciate that it can be difficult to prove that any particular acquisition is designed to extinguish a nascent threat; we must engage in detailed and careful fact gathering to develop appropriate evidence. Our staff do an increasingly good job of gathering the kind of evidence needed to look at whether a company used an acquisition to extinguish a competitive threat. But meeting the legal burden to challenge a transaction remains hard. Where we have a close-call case, we can benefit from retrospective studies to help us learn where we are getting things wrong and how to correct those mistakes. Where we have an unchallenged transaction that, with the benefit of hindsight, looks to have been problematic, we should revisit our original analysis to understand what we got right or wrong, and how we can improve that analysis going

¹⁵ Complaint at 12, *Illumina, Inc.*, Docket No. 9387.

¹⁶ Complaint at 1, *CDK Glob., Inc.*, Docket No. 9382 (Mar. 19, 2018), https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

¹⁷ Press Release, Fed. Trade Comm’n, *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>.

forward. In some transactions, that includes asking whether corrective enforcement actions are necessary.

Data and Platforms

In addition to thinking about the role of nascent competition acquisitions in big tech, I also want to address the particular role of data, and especially how it functions as an asset that may confer market power or be used to inhibit competition or entry. Like nascent competition, these issues are not new nor are they new to big tech. The concept of data as an asset that has some competitive significance or strategic value to companies is not new; it has long been a part of antitrust analysis.¹⁸ Certain types of data, especially if combined with a competitor's through a merger, could enhance market power by diminishing or eliminating competition for that asset and creating or magnifying barriers to entry. The Commission confronted the role of data as a key asset in the Nielsen/Arbitron merger. In that case, the Commission analyzed the role of data and assets related to the cross-platform audience measurement business, and ultimately required divestitures. The majority of the Commission believed that the merger was likely to deprive media companies and advertisers of the benefits of competition between two firms that were developing and most capable of providing an important type of data: syndicated cross-platform audience-measurement services.¹⁹

Some have argued that the correct fix to concerns about data concentration is a laissez-faire approach: Potential rivals should find their own way to create their own datasets. That solution has never quite made a lot of sense, and indeed has been rejected by the Commission. For example, as early as 2008, when the FTC challenged Reed Elsevier's proposed acquisition of ChoicePoint,²⁰ the relevant market was "electronic public record services for law enforcement customers." The Commission alleged that entry would be difficult because of the time and cost associated with developing comparable data. That difficulty existed notwithstanding the availability of the electronic records themselves to potential competitors.²¹

I want to turn now to platforms. When we say "platforms" we often think of big tech companies, but two-sided platforms that connect customers and services operate in many industries today outside traditional big tech ones. Whether inside or outside big tech, the specific concern is that an incumbent can use its position as a platform gatekeeper to prevent nascent or potential competitors or new entrants from reaching sufficient scale for growth by restricting their access to bigger customers.

¹⁸ See Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Deconstructing the Antitrust Implications of Big Data, Keynote Remarks Before the 43rd Annual Conference on International Antitrust Law and Policy 2 (Sept. 22, 2016), https://www.ftc.gov/system/files/documents/public_statements/1000913/ramirez_fordham_speech_2016.pdf.

¹⁹ Fed. Trade Comm'n, Statement on *In the Matter of Nielsen Holdings N.V. & Arbitron Inc.*, Comm'n File No. 131-0058, 1 (Sept. 20, 2013), https://www.ftc.gov/system/files/documents/public_statements/297661/140228nielsenholdingstatement.pdf.

²⁰ Complaint, Reed Elsevier NV, Docket No. 4226, 3 (Sept. 16, 2008), <https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080916reedelsevierpcmpt.pdf>.

²¹*Id.*

Last year the FTC filed an important but little-noticed platform monopolization case against Surescripts.²² Surescripts is an e-prescribing platform that operates in two different directions. Last April, the Commission sued Surescripts alleging that the firm used illegal horizontal and vertical restraints, including exclusivity, loyalty provisions, threats, and other exclusionary tactics to maintain monopolies over e-prescribing markets in routing of prescriptions and determining of eligibility for prescription benefits.²³ This case is still in litigation, but the judge recently rejected the defendant's motion to dismiss.²⁴ Among the arguments the judge rejected was Surescripts's claim that the Supreme Court's recent decision in *Amex* effectively immunizes conduct on two-sided platforms.²⁵

All of these non-tech cases illustrate the ways longstanding principles of antitrust law can be applied to some of the competition challenges posed by big data. But it is also important to consider ways in which the particular operation of big data in tech platforms may require different solutions. And we should think about whether we need additional enforcement regimes outside of merger enforcement to facilitate competitive entry.

Data operates as an asset for large tech platforms that seems to allow them—through a combination of consumer lock-in, winner-take-most, and network effects—to be insulated from competition. Firms with vertical or complementary relationships to the tech firms have little choice but to use them to reach needed eyeballs. This raises a question of whether we need to consider reviving a form of the essential facilities doctrine.

Let me start with some brief background on the doctrine, which dates back over a century. It was first articulated in the *Terminal Railroad* case in 1912, which involved a group of railroads that had acquired two bridges and a ferry—the only facilities available for transporting railroad trains across the Mississippi River.²⁶ While it was physically possible to build a fourth facility, the cost to any one company would have been “prohibitive.” Instead, because it was economically feasible to grant access to the bridges and ferry—the facilities that were essential to competition between rivals—the cartel was required to grant access.²⁷ Similarly, in *Lorain Journal*, a dominant newspaper refused to sell ad space to any merchant who also purchased ads from a competing radio station.²⁸ In other words, advertisers could buy radio or newspaper ads but not both. The court struck down the practice, noting that some businesses considered advertising in newspapers “essential for the promotion of sales in Lorain County.”²⁹ Demanding that

²² Press Release, Fed. Trade Comm'n, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets, (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

²³ Complaint at 5254, Fed. Trade Comm'n v. Surescripts, LLC, 424 F. Supp. 92 (D.D.C. 2019).

²⁴ Fed. Trade Comm'n v. Surescripts, LLC, 424 F. Supp. 92, 94 (D.D.C. 2019).

²⁵ *Id.* at 103.

²⁶ *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 394 (1912).

²⁷ *Id.* at 411–13.

²⁸ *Lorain Journal Co. v. United States*, 342 U.S. 143, 148–49 (1951).

²⁹ *Id.*

advertisers go to only the newspapers or to radio is the epitome of blocking the free flow of commerce; it goes directly against antitrust law’s prohibitions on restraints of trade.³⁰

The essential facilities doctrine has fallen out of favor over the last several decades, but there are parallels between the marketplace conditions that led to establishing the doctrine and today’s tech industry. Railroads co-opting every bridge and newspapers capturing all advertisers created bottlenecks that prohibited the free flow of commerce. Similarly, in digital markets, platforms may prohibit access that is essential for free-flowing commerce. This is true even if a company claims that its control over an essential facility is a natural byproduct of market conditions and thus its monopoly was inevitable.³¹ As the Supreme Court correctly noted, facilities that were essential for free-flowing commerce and practically impossible to recreate must be open to all on commercially reasonable terms.³²

Data portability is one idea that attempts to address this issue. Rather than making platform facilities available to all, ensure that users can migrate data from one service to another. But we have yet to see in practice whether this could work to meaningfully solve some of these issues. There is also an additional proposal to address data access by the new European Commission President Ursula von der Leyen. Recognizing competition’s need for free-flowing data, the EU has plans to pool European data and create EU-wide common and interoperable data spaces.³³ This effort could help to decentralize concentration in the market for data and to create opportunities for more robust competition among nascent and potential rivals of big tech platforms.

Data at the Intersection of Privacy and Competition

Creative ideas such as interoperability provide a perfect segue to the next topic I want to discuss: how privacy and competition policy and enforcement intersect with each other, and the extent to which enforcement or rules in one domain should affect enforcement or rules in the other.

Questions about competition and consumer protection no longer happen in isolation. Addressing a legal question or considering a policy change on one side often has profound implications for the other. For example, interoperability may promote competition, but, done poorly, it can risk consumer privacy: If companies are not only allowed but required to share sensitive consumer data with each other in order to interoperate, how are consumers put at risk?

³⁰ *Id.* at 154.

³¹ Wood, *supra* note 4, at 6–8.

³² *Terminal R.R. Ass’n of St. Louis*, 224 U.S. at 409–413; see also Marina Lao, *Networks, Access, and “Essential Facilities”*: From Terminal Railroad to Microsoft, 62 SMU L. REV. 557, 563–64 (2009).

³³ *Communication from the Commission to the European Parliament, the Council, the European Economic & Social Committee and the Committee of the Regions: A European Strategy for Data*, at 12 COM (2020) 66 final (Feb. 19, 2020), <https://ec.europa.eu/transparency/regdoc/rep/1/2020/EN/COM-2020-66-F1-EN-MAIN-PART-1.PDF>.

My colleague and friend Commissioner Noah Phillips said recently that we should be very skeptical of linking competition and consumer protection.³⁴ I agree with him that we cannot necessarily use competition tools to solve consumer protection problems, and vice versa. But I do not share his skepticism about linking the FTC's competition and consumer protection missions. We should consider applying the protection of both when grappling with issues that arise in either. I think this is a real strength that the FTC has that some of our counterparts in other jurisdictions don't have. We can apply competition and consumer protection lenses to the various issues we face. Not only do I think we can do it, I think we should do it. And in a way, it would be malpractice not to do it. If we see consumer protection issues arise in a competition case, we shouldn't ignore them just because that's the context in which it arose. And we should think carefully about how our solutions on one side affect the market conditions on the other.

This is a pretty basic law enforcement principle. A criminal prosecutor routinely charges a defendant with multiple different law violations arising out of the same conduct. It would be malpractice for the FTC to ignore, for example, potential privacy law violations simply because they arose in the context of a merger. Competition and consumer protection issues intersect in a few different ways.

First, consolidation can have implications for consumer privacy. For example, when a firm that collects vast amounts of consumer data but provides minimal privacy options and data security protections acquires a competitor that offers more effective privacy options and data security protections, the result could be a combined company that offers reduced quality of privacy protection and data security. We should consider data privacy and security as a potential metric of quality competition.³⁵ And we should also consider whether changes in how data is collected, used, and shared as a result of a merger may violate promises the collecting company made to consumers or otherwise run afoul of the unfair or deceptive acts or practices prohibition in the FTC Act.

Commissioner Phillips has also raised concerns that new privacy or data use laws and rules could actually exacerbate competition concerns by preferencing incumbents.³⁶ I very much share that concern. But we diverge in that I think it is possible to write privacy and data abuse rules that take the competitive implications into account and that will not unduly advantage incumbent players or disadvantage start-ups that do not have large compliance departments. For example, one way to guard against that potential result is to ensure regulations are structural, clear, and bright-lined.

Another example of the relationship between privacy and competition concerns is the omnipresent click-through privacy policies. Written privacy policies are intended to embody the sensible principle of notice and choice: tell consumers what you are doing with their data and let them choose whether to agree or disagree. But as all of our lived experience illustrates, this does

³⁴ See Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, *Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy*, Remarks Before The Center for Internet and Society 3 (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf.

³⁵ See Chairwoman Edith Ramirez, *supra* note 18, at 10.

³⁶ Comm'r Noah Joshua Phillips, *supra* note 34, at 11.

not work in practice. Notice is not meaningful because it is verbose and opaque legalese. And even if a consumer could understand it, choice is not a meaningful construct when there are not enough competing options in the marketplace for consumers to vote with their feet. In other words, too often, consumers have no choice but to accept the terms put forward by a company in order to access a service necessary for participation in today's society.

To be clear, I am not advocating that antitrust make an end-run around consumer protection issues. I also am not saying that more competition will fix all privacy problems. Instead, my point is that the issues are related, especially where companies with extremely large quantities of data also have extremely large market share. It is our obligation to recognize and respond to that market reality.

Making the Most of the FTC's Toolbox

I want to turn to a brief rundown on the FTC's toolbox. One of the reasons I value being at the FTC is because we have the ability to tackle this litany of concerns head-on both in competition and consumer protection using a comprehensive lens. We have three general tools for carrying out our competition and consumer protection missions—law enforcement, rulemaking, and policy initiatives—and I will share some thoughts on how we should deploy them.

Enforcement

Regarding enforcement, I think there are several ways in which we could strengthen our efforts. We can do that while appreciating the work that's happening right now. The first thing the FTC needs to think more about is our tolerance for litigation risk and how we do our risk calculus. The second thing I think we need to do is think about how to expand our technological and digital industry expertise. Finally, I think it might be worthwhile to the FTC to reconsider our policy of not disclosing investigations as a general matter.

On the topic of litigation risk: all antitrust litigation is challenging, and increasingly so. We need to be good stewards of our taxpayer funding by deploying our litigation muscle responsibly, and only where we think real violations of the law occurred. The FTC has taken some strong enforcement actions in the past year, particularly in alleging Section 2 violations in the Illumina/PacBio complaint and in our case against Surescripts. But we need to redouble our efforts to identify and prioritize issues and cases where we believe the law has been violated, even if that means assuming substantial litigation risk. Losing loudly, if we believe what we're doing is the right thing, can help demonstrate to Congress the need for changes to the law.

The decision about which cases to bring also involves error-risk calculation, and will require an adjustment to our error-risk tolerance. When you're making a decision about whether to enforce the law in the context of antitrust, you're necessarily engaging in a predictive exercise. We try to guess what market conditions will look like, and what the incentives of the merging parties will be in order to predict their post-merger behavior. When you are trying to be predictive, you take on the risk that you might be wrong. You could be wrong in two directions: You can make Type I errors, where you enforce where enforcement would be inappropriate, or you can make Type II errors, where you fail to enforce where enforcement would have been needed. I think antitrust

has developed a very robust fear of Type I errors—a real sense that we shouldn’t enforce when we’re not certain of harm. But we have a very underdeveloped fear of Type II errors, and an underdeveloped sense that there is a real problem where we fail to enforce when enforcement is needed. Bringing that error-risk balance back into more of an equilibrium is something that is really important to me.

Furthermore, if we are going to take on additional risk, we should also make sure we are equipped with adequate analytical tools. Antitrust enforcers are accustomed to analyzing fast-paced and high technology markets. But given the ubiquitous nature of data and the fact that every industry now includes a technological component, I think the FTC should expand its expertise by establishing a Bureau of Technology. We currently put an in-house economist on every single case and we should do the same with a technologist. The Bureau of Technology could also significantly aid our 6(b) study capabilities for key competition and consumer protection issues, including IoT security, AI, ad-tech, and data portability, to name a few. CMA has put together a pretty compelling and impressive model for us with their Data Technology and Analytics (DaTA) unit. The unit was established to help the agency apply “the latest in data engineering, machine learning and artificial intelligence techniques” to hone its own tools and to better understand how firms are using these technologies.³⁷

Finally, we should consider our approach to investigative transparency. Under our current rules, all FTC investigations are non-public to protect both the investigation and the individuals and companies involved. The CMA, however, usually announces not only its investigations but also the names of parties involved in the investigations. Though I can see very legitimate reasons for the FTC’s approach, there may be benefits to the CMA’s model. One such benefit includes providing third party stakeholders, who might not otherwise come forward, with opportunities to offer their perspectives as possible fact witnesses in an investigation. We want those with information concerning our investigations to come forward and share what they know without fear that their complaints may disappear into a black hole. Fear of retaliation is a legitimate concern should investigations be publicized, but the fact is that any investigation material to a public company must be reported to investors. I also think public acknowledgement of ongoing investigations can provide accountability for both the agency and the markets—the Commission would be responsible for the decisions it makes and the existence of investigations could deter other market participants from engaging in problematic behavior.

Studies and Retrospectives

Along with our enforcement mission, the FTC has the important and unique authority to conduct broad market studies and analysis under Section 6(b) of the FTC Act. The agency also can and does engage in merger retrospectives. These are two tools that we should deploy more, and specifically in the digital space. I will again acknowledge that the amount we can do on these fronts depends on resources, but taxpayer dollars would be well spent on ensuring that the FTC—and the public—comprehensively analyzes important markets in ways that would also

³⁷ See Stefan Hunt, *CMA’s New DaTA Unit: Exciting Opportunities for Data Scientists*, COMPETITION & MKTS. AUTH. BLOG (Oct. 24, 2018), <https://competitionandmarkets.blog.gov.uk/2018/10/24/ctas-new-data-unit-exciting-opportunities-for-data-scientists/>.

improve our enforcement efforts. One such valuable effort is the 6(b) study I mentioned earlier into acquisitions by top tech firms.

In addition, I think the FTC should initiate a 6(b) study related to both the competition and consumer protection aspects of advertising technology, and I echo my colleagues Commissioner Wilson and Chopra's recent call for such an effort.³⁸

Finally, merger retrospectives, particularly in the digital arena, will help the agency evaluate its record and identify ways to improve enforcement. The FTC has a long history of being a self-reflective agency.³⁹ We regularly engage in merger retrospectives to test the accuracy of our predictions about a given merger. The FTC ethos of being willing to do a constructive evaluation of its effectiveness is a characteristic that has helped make it a unique and particularly strong institution.

Regulatory Tools

Market analysis can help us hone and target our enforcement efforts, a critical function of the FTC, but antitrust enforcement is primarily a tool that operates after a violation has occurred or is imminent. Antitrust policy, however, is not limited to enforcement; it can also include competition regulation, including at the FTC or at other federal agencies. We can and should look to both mechanisms to accomplish our mission.

The FTC has not engaged in Administrative Procedure Act rulemaking under its Section 5 unfair methods of competition authority for more than 50 years.⁴⁰ This is a tool that we should dust off, because clear ex ante rules can often be more efficient than labor-intensive ex post enforcement.⁴¹ Specifically, I strongly support the Commission's opening a rulemaking related to non-compete agreements, an issue relevant to the tech industry, but also troublingly prevalent for many low-wage workers. We should also consider how rulemaking might help us address some of the unique competition problems posed by business models that rely on widespread accumulation of data.

Other agencies can also play a role in creating regulations that promote competition. For example, the Federal Communications Commission has rules—recently reinstated after an order by the Third Circuit—that restrict the number of media outlets that a single entity may own or control in local geographic market, and includes the so-called eight-voices test, which requires at

³⁸ Comm'r Christine S. Wilson & Comm'r Rohit Chopra, Fed. Trade Comm'n, Statement 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.

³⁹ Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at the Georgetown Law Global Antitrust Enforcement Symposium 8–9 (Sept. 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

⁴⁰ See Discriminatory Practices in Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968).

⁴¹ Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 358 (2020).

least eight independently owned and operating voices to remain in the market following a merger. This is not framed as an antitrust rule, but it reflects the desire of Congress to promote localism and diversity by way of ensuring a certain level of competition. DOT similarly has rulemaking authority to promote competition in the airline industry.

European Enforcers & US Enforcers: Collaboration

The digital economy continues to proliferate across multinational borders resulting in many of the various competition regimes facing similar issues. By collaborating on best practices, we might improve the techniques and tools used for investigating mergers and conduct. Not only should we consider sharing economic learning and research methods to enhance collective knowledge of tech and other related markets, but we might also consider sharing data analytics and data tools.

Like the U.S., the EU has well-developed competition law aimed at preventing and stopping anticompetitive behavior. Thus, it is important to continue to observe European cases in practice because that observation offers opportunities to consider the benefits and risks of potential changes to our U.S. statutory standards. It is important to compare and contrast the FTC's and DOJ's authority under U.S. law and the law under which our European Commission counterparts operate. The European Commission has been pursuing high profile competition cases that involve American companies. They are working with an entirely different set of laws with respect to competition—the abuse of dominance standard, which does not exist in our statutory framework, puts specific burdens on firms that reach a certain market share.

While the tools we use may be different, there are many similarities in the questions and market conditions we are confronting in different enforcement jurisdictions. We all—as enforcers, and as global citizens—benefit from cooperation and dialogue across jurisdictions to sharpen our thinking, hone our tools, and learn what lessons we can from our counterparts' approaches. I very much look forward to continuing that engagement as we tackle the biggest—both literally and metaphorically—antitrust questions of our time.