UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
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Think Big . . . [Tech]! – Thoughts about the Path Forward for Enforcement

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London, UK
March 2, 2020

Introduction

Good afternoon. Thank you to Global Competition Review for inviting me to speak here today.
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Studies show increasing concentrati

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 powerfup (i)-iaelS (s)[(w (a)r5 (it)r)

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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 s1 (t)-1 (h)18/BBox

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 twenty 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

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[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/1172290/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/hi.84W1gF

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 in other industries. Take wireless telecom0.002 Tw [(gc)-1 76.46 713.325 0 Td [(s:)-1 ( )]TJ 0 Tc 0 Tw (b)Tj 0.0

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 competitive threats. 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 those

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 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. 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. Likewise, 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/d09382_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

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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 *Ohio v. American Express* 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

advertisers go to only the newspapers or 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

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.

not work in practice. Notice is not meaningful because it is verbose and opaque legalese. And

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—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 a 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, adtech, 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

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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 add 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 intensive ex post enforcement.[41]

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 international 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 E[illegible]rd ontd8-12.526Tw 7.7((ch)1 r0 Td s 0 Tc (m)10 (a)1 Fa)-1T.001C001 Tw8.71-0.004 ’s