Concurrences
Antitrust Publications & Events

NYU STERN

THE GLOBAL ANTITRUST ECONOMICS CONFERENCE

December 8, 2022 - New York University Stern School of Business

AXINN · BATES WHITE ECONOMIC CONSULTING · Brattle · CLEARY GOTTLIEB · ELİG GÜRKAYNAK Attorneys at Law · Meta · WHITE & CASE

PROGRAM

Registration & Breakfast

WELCOME REMARKS

Lawrence WHITE | Professor - Department of Economics, NYU Stern School of Business, New York

#1 COMPETITION IN LABOR MARKETS: WHAT ANTITRUST HAS TO DO WITH THAT?

Rosa ABRANTES-METZ | Principal, Brattle, New York

Elinor HOFFMANN | Chief, Antitrust Bureau Office of the Attorney General, New York

Koren WONG-ERVIN | Partner, Axinn, Washington D.C.

Moderator: Daniel FRANCIS | Assistant Professor of Law, NYU School of Law

Coffee Break

#2 MERGER CONTROL IN THE NEW WORLD OF ANTITRUST

George S. CARY | Partner, Cleary Gottlieb, Washington D.C.

Gwendolyn COOLEY | NAAG Antitrust Task Force Chair and Winsconsin's Assistant Attorney General, Office of the Attorney General, Madison

Gönenç GÜRKAYNAK | Partner, ELIG Gürkaynak Attorneys-at-Law, Istanbul

Douglas RATHBUN | Public Policy Manager, Meta, Washington D.C.

David TESLICKO | Counsel to the Assistant Attorney General, U.S. Department of Justice, Washington D.C.

Moderator: Luis CABRAL | Chair - Department of Economics, NYU Stern School of Business, New York

Lunch

14.00 **#3 BIG TECH ANTITRUST BILLS**

Eric EMCH | Partner, Bates White, Washington D.C.

Bryan GANT | Partner, White & Case, New York

John KWOKA | Finnegan Professor of Economics, Northeastern University

Bilal SAYYED | Senior Competition Counsel, Techfreedom, Washington D.C.

Moderator: Bill BAER | Visiting Fellow, The Brookings Institution, Washington D.C.

15.30 *Coffee Break*

15.45 **#4 SUSTAINABILITY, CLIMATE CHANGE, AGRICULTURE...**

Joshua P. DAVIS | Professor, University of California, Hastings College of the Law, Berkeley

Paul DE BIJL | Chief Economist, Netherlands Authority for Consumers & Markets, The Hague

Kathleen KONOPKA | Deputy Attorney General, Office of the Attorney General for the District of Columbia, Washington D.C.

Moderator: Lawrence WHITE | Professor - Department of Economics, New York Stern School of Business, New York

17.30 *Cocktail*

PANEL 3

BIG TECH ANTITRUST BILLS

Bill Baer

Visiting Fellow
The Brookings Institution

Bill Baer moderated the discussion.

Bryan Gant

Partner
White & Case
New York

Bryan Gant presented an overview of the different proposed bills, which fall into several possible categories. There are (or were at the time of the conference) nineteen different bills that could impact tech companies.

First is the procedural bucket, including bills such as those that would allow state Attorney General actions to proceed in those AGs' preferred venues rather than be consolidated into multidistrict litigation. This bill has been passed by both houses of Congress and the President has indicated that he would sign in, so it seems like to be adopted.

The second bucket would deal with the issue of self-preferencing or discrimination. On this matter, it is possible that the American Choice and Innovation Online Act may be voted on by Congress, though it is uncertain given the time constraints remaining before the new Congress.

There is one bill that would address data portability.

There have also been various proposals to break up technology companies in various ways, including some that might offer only one year to divest large parts of the business. Some bills advocate limiting mergers between Big Tech Companies in different ways.

There have also been bills that propose that either a new agency should be created, or part of the FTC should be charged with dealing with these problems.

Regarding online news services, there are two proposals, one of which would effectively give news organizations the power to negotiate jointly with online news distributors.

Some legislation proposes to change the rule of reason or agreements made under the Sherman Act.

Lastly, a proposed bill aims at correcting the inequalities of market power by allowing artists to negotiate jointly.

The further discussion will focus primarily on the self-preferencing bucket because it is the only proposal that seems likely to really get a vote (other than the venue act).

Eric Emch

Partner
Bates White
Washington D.C.

Eric Emch discusses the issue of whether new legislation is required to enhance antitrust enforcement of big tech or whether

the current laws are flexible enough to be used in to address competition issues in the big tech space. As an example, he discussed current litigation and legislative proposals surrounding app store competition Google and Apple have each been accused of restricting competition in the distribution of applications for their smartphone operating systems. Application developers are generally charged a 30% fee for the sale of digital goods on iOS and Android. There is ongoing private litigation that accuses Google and Apple of monopolizing their respective application distribution markets. A large developer, Epic, was the first to bring such a case against Apple and Google. In the Apple case, it lost on the antitrust counts but the case is under appeal.

If you think that Epic's loss means that the current antitrust laws need to be strengthened, consider the Open App Markets Act. The Open App Markets Act, which is currently being considered by Congress, takes all the practices that Google and Apple are accused of in the private antitrust cases and make them illegal. There are still defenses that relate to privacy, security, safety, intellectual property infringement, but the burden of proof is more on the defendant than under current antitrust law.

He argues that apart from this sector-specific approach, another approach to supplementing current antitrust laws is writing broader legislation that covers a broad category of behavior, as the American Innovation and Choice Act is doing, which attacks self-preferencing, discrimination, and tying behavior more broadly. A third approach might to create a specialized agency, that could be just like the FCC or FTC but focused on big tech Companies. According to Eric Emch, the best approach is up for debate. He classifies the approaches according to a two-dimensional framework, rigid vs. flexible and broad vs. narrow. In that metric, the Open App Markets Act is very rigid and narrow, and conversely, the traditional application of antitrust law is very flexible and broad. Eric Emch believes that traditional antitrust enforcement has worked well in the past. He is therefore convinced that the traditional approach could be effective in regulating the distribution of applications. On the other hand, he believes that this approach has its weaknesses, for example it has trouble addressing potential competition.

Eric Emch draws a comparison between platforms and natural monopolies to determine the way market power issues should be addressed. If an industry is truly a natural monopoly, it might be necessary to resort to an essential facilities type doctrine, but qualification of an industry as a natural monopoly is not obvious, and one can ensure that there is no blockage of entry by applying current antitrust laws vigorously.

Bilal Sayyed

Senior Competition Counsel
TechFreedom
Washington D.C.

Bilal Sayyed is concerned about the legislation because he believes it attempts to find answers to questions that are not settled. According to him, it is better to proceed on a case-by-case basis as some of the behaviors covered by the legislation may be pro-competitive. Some antitrust laws are enforced through a legislative rather than case law approach, such as the price discrimi-

nation in the Robinson-Patman Act and the prohibitions in Section 2 of the Clayton Act on certain tying and exclusive sales conditions.

The legislation is generally focused on a relatively small number of companies, which he thinks is bad policy. Many of these companies have reached the stage of having market power but have provided a fair number of benefits to consumers and trading partners. Bilal Sayyed recommends a more rapid development of the common law approach throughout the Sherman Act and the Clayton Act. Antitrust cases take too long, but both congressional and judicial procedures can be improved.

These companies are the object of political attention, but this attention is not limited to competition, and antitrust is used to punish these companies and pick favorites, which is why Bilal Sayed is in favor of the common

With respect to the persistence of market power, Bilal Sayyed addresses several questions: whether the market power was obtained through misconduct, how come so many cases are not litigated by agencies or private parties.

John Kwoka

Finnegan Professor of Economics
Northeastern University

Over the past decade, digital markets have become increasingly concentrated due to underlying economic characteristics, behavioral factors, strategies and practices of business. The major tech companies have acquired hundreds of companies in the last few years and yet not one acquisition has been subject to merger control, which shows a clear problem of under-enforcement. Most of the bills pending in Congress are concerned more with corporate practices than with restructuring.

On the other hand, the EU wants to move faster. The Digital Markets Act will come into full effect in May next year. The DMA works quite simply: it defines its scope, it lists the obligations and prohibitions that companies must comply with, and it sets out sanctions. The DMA defines the criteria for «gatekeepers», which is a well-established platform in the market, which serves as an intermediary between a large number of users and companies, and there are also numerical criteria. Regarding the obligations and prohibitions of gatekeepers, they must allow third parties to interoperate with their services. Professional users can fully dispose of their data and are not bound by an exclusivity clause. Gatekeepers are subject to certain prohibitions: they are not allowed to self-refer, to cross-use the collected data, nor to require most-favored-customer clauses from business users. As for tying, the DMA prevents platforms from requiring users of one service to be tied to another service.

According to John Kwoka, the EU text intends to give a fairly specific set of actions that are either prohibited or required. This precision should allow for more direct application and enforcement of the regulations as opposed to broader language. In the United States, laws are dictated in a broader language which, on the one hand, allows greater flexibility, but on the other hand, slows down their application and interpretation.

When comparing the U.S. approach and the European approach, several observations can be made. Both approaches agree that barriers to entry are high so that it is difficult to challenge the current gatekeeper's position. They also agree that there is very

little merger control and that policies focus more on practices than on restructuring measures. Both approaches have concerns about the ability of agencies to enforce these measures. However, there are also differences between the two approaches. In the United States there is a greater emphasis on case-by-case treatment, whereas in the EU there is a greater willingness to engage in effective regulatory action.

In terms of optimal policy design, there is the issue of the specificity approach compared to the general approach and the ex-post strategy compared to the ex-ante strategy. These choices will affect the effectiveness of the policy even when the purposes are the same. Moreover, policy design must also consider the costs of administering the policy proposal. This comparison raises other questions, such as the place of advertising in all this regulation, or its articulation with data security and privacy concerns. It also raises the question of how the approaches address the difficulty of dealing with technology and how agencies are equipped to deal with these concerns.

Questions and answers

The first question of the audience relates to the **role of the judge in the enforcement of the legislation.** According to **Eric Emch**, part of the problem is that judges are giving too much deference to companies. Big Tech companies are represented by highly skilled businessmen who are experts in their field and can manage to defend their case. **Bilal Sayyed** does not side with Eric Emch. He believes that the FTC's administrative system can solve this problem, even though he does not exactly agree with the way it has been operating in recent years. The FTC's administrative system would make better rulings than the general courts.

One question relates to **the ability of current antitrust jurisprudence to address the perceived problems of platform dominance. Eric Emch** argues that guidelines have a great influence on the way courts solve their cases, he specifically refers to the Horizontal Merger Guidelines. **Bryan Gant** tends to believe that litigation is the best approach, even if it is slow, because it allows for all aspects of the issues to be addressed. **Bilal Sayyed**, believes that the courts may not be well equipped to weigh the harms and benefits, and that the FTC could do so through its administrative process. The 1968 and 1982 guidelines have evolved into a valuation framework that courts use for horizontal mergers. They are useful because they refer to the underlying case law. ■