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7B Competition & Four Concurrent Sessions. Antitrust: AI and Digital Platforms

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SESSION 7: COMPETITION & FOUR CONCURRENT SESSIONS

7B. Antitrust: AI and Digital Platforms

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DARYL LIM: Welcome everybody. In these strange times, it's always difficult to say good morning or good afternoon but wherever you are welcome. This is the session that is always a little bit of an outlier but one that has always been important and perhaps more than ever is one that IP lawyers should be thinking about. We're very pleased to have with us a group of distinguished panelists, which I'll be introducing momentarily. Just a couple of words about the format. It's going to be pure discussion. We have 60 minutes between us, and we invite the audience to feed us your questions. Whenever you think that you have a question, and we'll get to them not necessarily at the end but even in between if there's an appropriate juncture. With us today we have– I'll just go in the order that you appear in the program.

Damien Geradin from Geradin Partners, Brussels. Bill Kovacic at GW and former chair of the FTC[1]. Tom Nachbar from the University of Virginia. Thibault Schrepel, Utrecht and Stanford. We have Charlotte Slaiman from Public Knowledge and Angela Zhang from HKU. Welcome, everybody. Just before we started, we were musing about war and peace and I thought that might actually be quite an appropriate way to think about where we are with antitrust law. We're going to be talking about two big themes today: digital platforms and artificial intelligence. In a way, it not just bridges the session that we've had before but the session that will come afterwards. It also, I think, fits very nicely into an international IP conference like this because the very nature of what we'll be discussing transcends borders.

Let's start with the question of digital platforms and in particular, the issue of consumer welfare. Consumer welfare is for those of you unfamiliar with the doctrines in antitrust law really is the cornerstone of what drives a lot of what happens in antitrust law but what is consumer welfare and how should we think about it in this brave new world of digital platforms? Let's start with Tom.

THOMAS B. NACHBAR: Oh, well, thanks so much, and thanks for having me today. I'm really looking forward to this conversation and I'm excited by the discussion format because what I have to say about consumer welfare is to some extent a question. Consumer welfare is being held up today I think as an impediment really to a lot of antitrust reform. This idea for those who are unfamiliar with it we I'll lay it out a little bit but its place in modern antitrust law is largely attributed to Robert Bork and his book *The Antitrust Paradox.*[2] I kind of have a view on what consumer welfare is but what's most interesting to me about consumer welfare is I think it's become or the consumer welfare standard in antitrust I think is that it's become a placeholder. It's become a placeholder both for I think a set of policies or a set of approaches that courts take.

It's also become a placeholder for an impediment to a set of policies or a set of positions that courts might take. I was actually hoping to open the discussion a little bit to how the other panelists perceived the consumer welfare standard. I'm familiar with some of your all's work so I know where some of you are coming from on this, but I think it might be helpful to talk about it a little bit. To get this started, my own view on consumer welfare is that or the standard I should say is that it basically requires those who would invoke the antitrust law to explain how a particular restraint or practice has an effect on consumers. At the time that it was really first or pushed in its modern form that was in response to a set of antitrust standards that really emphasized more heavily the role of competitors in the sort of antitrust ecosystem. I'm curious to hear how others think about the consumer welfare standard and how much work they think that it's doing in today's antitrust debates in specifically with regard to platforms. I don't know–

DARYL LIM: Tom, why don't you pick someone?

THOMAS B. NACHBAR: Why? I was going to say I didn't want to have to–

DARYL LIM: You should be well versed as a professor.

[1] Federal Trade Commission.

[2] ROBERT H. BORK, THE ANTITRUST PARADOX (2d ed. 1993).

THOMAS B. NACHBAR: At picking someone? Bill, what do you think about consumer welfare? I'm going to pick someone who's easy because I already have some sense of Bill's views on consumer welfare.

WILLIAM E. KOVACIC: Thank you, Tom and thank you, Daryl, and most of all Hugh for the wonderful opportunity to participate in the discussion. I can't say enough about what Hugh has done in building a forum over the decades for conversation and discussion. I admire him so much for doing it. I think a difficulty in the modern debate is that consumer welfare carries a lot of baggage with it. It is a beguiling phrase which was deliberately chosen for its facial attractiveness but everything depends on what it means. I can give you a sense of what I think it has not meant in practice. It has not meant a single-minded focus on price and output effects.

There've been so many instances in the last 40 years in which competition agencies and courts have given effect to innovation-related concerns, for example, and indeed at times have taken into account distortions in labor markets that would ultimately affect consumers. I suspect a further difficulty here is that it is associated in modern discourse so completely with the views of Robert Bork and the Chicago school that it obscures other forces at the time that are focused attention on the consumer interests. Ralph Nader's group in the early 1970s said again and again that competition law should take into account consumer interests. Everything depends, as Tom was saying, on how we define the term.

I would certainly think that if you looked at what agencies have done and what courts have done, the concept as a goal, a focal point for enforcement has to encompass the interests of consumers in innovative markets in quality-price effects to be sure but also all other market distortions that ultimately undermine the consumer interest. I think that one thing that does stand out though is that in the modern debate, those who call for a transformation of the system want that view of competition, want to be repudiated completely.

A telling example is the House Majority Staff Report[3] prepared under the aegis of the House Subcommittee on Antitrust in the Senate Judiciary Committee. It has a paragraph that says we want a broader concept known as basically citizen welfare that looks at the interests of individuals, not just as buyers of goods and services, but as residents of local communities.[4] As entrepreneurs, as employees, in small and medium enterprises with a stake in decentralization of authority as a means of preserving democracy itself. That would bring us back in many ways to a more egalitarian view expressed in Supreme Court decisions in particulargv in merger cases in the 1960s that would change the focus of what we do.

I feel a disappointment in the modern debate that consumer welfare is so often associated just with price and output effects. I don't think that's what's happened but the critics have even a broader conception would certainly take us to a much greater concern with the disappearance of individual entrepreneurs perhaps in the view that in the long term that hurts consumers as well.

DARYL LIM: All right. Thanks, Bill. Now, let's segue that to what does consumer welfare mean in terms of understanding what's going on with digital platforms, and Bill I think alluded to that when he talked about

[3] SUBCOMM. ON ANTITRUST, COMM. AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (2020).

[4] *Id.* at 391.

the report, but let's bring that front and center. How does consumer welfare inform your view of what should be done with digital platforms, if at all?

THOMAS B. NACHBAR: Darryl, is that open to the panel as all?

DARYL LIM: Yes, it is.

CHARLOTTE SLAIMAN: I think it's important to bring in here how the consumer welfare standard has figured into, in particular, the Facebook case that the FTC has brought against Facebook for their alleged antitrust violations.[5] I agree with Bill's description of the consumer welfare standard. In reality, it is not limited to consumer prices– it is supposed to include innovation. It is supposed to include product quality but I think there is a lot of truth to the concerns that the courts have been overly focused on consumer prices.

Whether that is due to the consumer welfare standard or whether that is due to the fact that it's easier to do this complex economic modeling that we've become so reliant on when you're looking at consumer prices than innovation. Innovation can be really hard to quantify but it's so, so important. We saw Facebook in their motion to dismiss to the FTC case, arguing that because their product is free to consumers, that they can't be monopolizing. [6]

I think that I sure hope that the court does not adopt that position. The FTC was very clear that non-price markets can still be subject to the antitrust laws. There are real quality concerns that we have about Facebook's product or consumers may be paying with their data and their attention. These products are not really free. Seeing that argument in such an important forum is concerning and I want to make sure that, that sort of confusion is not taking root. I do think this is one of the areas that Congress should be looking at, for reforming the antitrust laws.

DARYL LIM: Charlotte, let me follow up on with a couple of questions. When you talk about data and product quality, what is the harm to consumers?

CHARLOTTE SLAIMAN: Yes. I think if consumers really had choice, if Facebook was pushed by competition to be more clear about how they are treating users' data, we would have better privacy on Facebook. Instead, people's data is being used in ways that they are not aware of. Then, when they find out, they are really not happy about it. There have been some high-profile, particular scandals but even just the day-to-day use of the data to target ads in what appear to be very effective and manipulative ways. I think there's still some empirical question about how effective targeted ads really are?

I think in a competitive environment, where companies really were clear about what their privacy policies were in a way that consumers could actually understand, there would be a higher quality product. There would be better privacy and there isn't. I think that's because of the lack of competition.

DARYL LIM: All right. Next, I want you to comment on something that Bill mentioned, which is citizen welfare. Is what you're advocating more like citizen welfare than what we have traditionally thought of as consumer welfare?

CHARLOTTE SLAIMAN: I don't think we need to go that far in order to make real improvements here. I think reiterating the importance of these other

[5] Fed. Trade Comm'n v. Facebook, Inc., No. CV-3590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021).

[6] Memorandum in Support of Facebook, Inc.'s Motion to Dismiss FTC's Complaint at 2, Fed. Trade Comm'n v. Facebook, Inc., No. CV-3590 (JEB), 2021 WL 2643627 (D.D.C. June 28, 2021).

categories that I think are already part of consumer welfare. Innovation, in particular. Bill mentioned that there have been cases brought about innovation harms, and I think that's right. I can't think of cases that have been only about innovation. I'm confident that Bill knows a lot better than I do. Maybe you know some cases. I can't think of any cases that have been only about innovation.
Innovation is often a part of the case that also has price effects or also has quality effects. I do think innovation is being left out. One of the legislative proposals in Congress that I've been really impressed with is Senator Klobuchar's antitrust reform package[7] that was introduced this Congress. It is more about changing presumptions, to make it easier for enforcers to bring a case. I think that's the way forward.

DARYL LIM: We're going to talk about the Klobuchar bill in just a moment, but I want to invite the panelists just weigh in if you have any thoughts on what's been said so far.

DAMIEN GERADIN: What I wanted to say is that I think this consumer welfare debate is very much an American one. We've seen the focus of a lot of discussion in the US. In Europe, we hardly speak about it, especially when it comes to platforms. I think that we understand consumer welfare as very broad in nature. Not at all, only concerned with prices. I think that it's really, I wouldn't say it's a non-issue, because it comes from time to time in discussions. But those in favor of more antitrust enforcement with respect to platforms do not consider the consumer welfare standard has been an obstacle of any kind. I think we've got other issues but not this one.

DARYL LIM: Follow up to that, Damien. To what extent do you think this dichotomy–if you like– the tension that we see in the US is a product of the legacy of the Chicago School? How that perhaps has not been quite as evident in places like Europe?

DAMIEN GERADIN: Yes, that's perhaps the case. I think Europe is different in the sense that we've had quite a lot of antitrust enforcement. Especially when it comes to abuse of a dominant position, there have been multiple cases. Whereas in the United States, if you look at it, there hasn't been much since Microsoft. Is it because the focus is on consumer welfare or on excessively narrow issues? Perhaps. When I read some decisions, American decisions such as for example, the Court of Appeals decision in FTC versus Qualcomm,[8] I tend to think we operate in different worlds in many ways.
I think that competition law is broader in Europe, definitely when it comes to single-firm conduct. Perhaps, it's still the influence of the Chicago School that is stronger in the US. I don't know but definitely in Europe, there has been more enforcement. As I will say in a moment when we turn to Europe, a lot of unsuccessful enforcement's as well in the sense that we have infringement decisions but in practice they haven't changed anything at all. This is why we're moving away from antitrust, not because it's too narrow but because it's largely ineffective to deal with platforms. We're moving to regulation by and large.

DARYL LIM: All right. Thanks, Damien. Angela?

ANGELA ZHANG: We in China have been watching this debate in the United States about consumer welfare and have asked, what is the proper standard to use? I actually watch with trepidation from a Chinese perspective

[7] Competition and Antitrust Law Enforcement Reform Act of 2021, 117th Cong. (2021).

[8] Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020).

because as you know in China, the antitrust enforcement is seldom subject to judicial reveal. Everything is internalized. When I'm talking about administrative enforcement, it's internalized within the bureaucracy already. Now, if you change the consumer welfare model, which was originally based on price effects, to some other standard which seems more elastic and more open-ended, and more flexible for the agency to use, I'm just concerned about this kind of abuse of administrative power in the Chinese context because at least right now we have something to start with, to start assessing. And so that companies have an idea when they ask, "How do I do compliance?" Once you completely shift the model, then the whole thing becomes very arbitrary. I do share sympathy with the concern that our distinguished panelists have with regard to Big Tech, and in China, we face very similar issues as well.

DARYL LIM: A little bit more though since we have you on the spotlight, tell us about why is it that all of a sudden you see vigorous enforcement action against its own homegrown tech giants and what is it really concerned about, the Chinese government?

ANGELA ZHANG: For those of you who follow what's going on in China, it all started from a controversial speech that Jack Ma made back in October last year[9] in Shanghai in which he made some remarks that criticized Chinese financial regulation which directly, irked some of the top leadership in China. As a result, you saw a sudden change in attitude toward Big Tech since that speech. Ant Group, which was the world's largest FinTech company, which was supposed to launch the largest IPO[10] ever, actually had to suspend its IPO at the very last minute. Then, the Chinese financial regulators also issued new draft rules, tightening FinTech regulation in China.[11]

Then you saw the antitrust regulator, jump onto the bandwagon and start tightening regulation by issuing draft guidelines and tackling the platforms followed by investigation into Alibaba. I believe the recent trigger of this scrutiny has to do with this kind of policy shift directed from the top leadership. This is something very different from what you'd have observed before because before it had mostly been driven by bottom-up efforts, but now this is the first time I observed a very clear policy signal from Beijing to exert greater control over this area. Obviously from the standpoint of an antitrust regulator, they see this as a very exciting opportunity to step out into the policy limelight.

As you know, since 2016, Chinese antitrust has been relatively quiet and we don't often see any very big cases like Qualcomm. It's not because we haven't had issues before. There have been continuous complaints about the exclusionary conduct in other tech firms like Alibaba and Tencent, but there have not been any penalty decisions imposed on these companies. One important reason has to do with the fact that, as this antitrust agency is an agency within the larger ministry, it is subject to a lot of bureaucratic constraints, and it wasn't sure at the time where to stand in terms of regulating the Chinese domestic tech giants.

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[9] Jack Ma, Bund Finance Summit Speech (Oct. 24, 2020) (translated transcript available at https://interconnected.blog/jack-ma-bund-finance-summit-speech/).

[10] Initial public offering.

[11] Guānyú píngtái jīngjì lǐngyù de fǎn lǒngduàn zhǐnán (zhēngqiú yìjiàn gǎo) (关于平台经济领域的反垄断指南（征求意见稿）) [Antitrust Guidelines on the Platform Economy (Draft for Comments)] (promulgated by the State Admin. for Mkt. Regulation, Nov. 20, 2020, available at http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html).

If we are thinking about technical nationalism, why would you use your own antitrust law to crack down on your own most innovative firms? That explains why the antitrust regulator has been quite tolerant and cautious in dealing with these issues. They're trying to apply other more lenient tools, like, the Anti-unfair Competition Law or the E-commerce Law to deal with some of these cases.

DARYL LIM: Help us to understand, in terms of predicting what's to come, should they look at [inaudible] this is how they're going to apply the Chinese Competition Laws. Should they look at the US model or is the Chinese government really creating its own path?

ANGELA ZHANG: I think the Chinese government is definitely exceptional in this, regardless. No way they're going to follow the EU or the US model given the fact, as we just talked about, that there are not Western checks and balances in China, but rather there is a Chinese style of checks and balances which is something I've been writing about in my book, and more generally, about this power fragmentation in China, where you see many different agencies having overlapping responsibilities over these platform businesses.

Now the question becomes should we use Antitrust Law to deal with this problem, should we use financial regulation, and what about data privacy? I think, there are many different moving pieces right now that concern the regulation of Big Tech. I believe these bureaucratic politics will continue to play out and affect the ongoing regulation of big tech in China.

DARYL LIM: Thanks, Angela. I know Thibault had a comment and then we'll go to Damien. Thibault.

THIBAULT SCHREPEL: It seems to me that when it comes to the debate regarding the consumer welfare standards, in the US it's very much market-based even when you hear in the reports sent to the Congress that's Big Tech is bad for the press and in the media, it's always taking market metrics saying it's bad because look at the advertisement revenues and so on. In Europe, what we have is that we very much have a discussion, which is market versus non-market, good for the market versus bad for the environment. That's something which is potentially a bit different.

When it comes to within the market and the consumer, it's true that in Europe, we see that consumer welfare isn't always about prices, but I think we have to understand the tech and the business model a bit better because when I read in the European Commission decision that reduction of choice always equals a reduction of consumer welfare, I think this isn't true. We have a lot of behavioral studies showing that a certain type of reduction may actually be good for consumers meaning that the question in my view should be when the big tech companies reducing choice are they doing that in a way, which is good for consumers, which is the possibility or are they doing that in a way, which is good for them? If you simply say less choice equals bad for consumer you never get to ask the right question, which is why I think the Google case is so problematic while again, the practice may very much be anti-competitive.[12]

DARYL LIM: By the way, Thibault, what do you think of *Trinko*?[13]

THIBAULT SCHREPEL: Of the *Trinko* case in the US?

[12] Summary of Commission Decision of 27 June 2017 Relating to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)), 2018 O.J. (C 9).

[13] Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

DARYL LIM: Yes. It also echoes exactly what you're saying.

THIBAULT SCHREPEL: Well, yes, it's a long discussion, but when it comes especially to choice reduction in that case. Well, I know everything you say but *Trinko* might be controversial. Overall, I think it's pretty much a good decision for the reason that I just explained. I see some other issues in the case that we could be discussing as well.

DARYL LIM: All right. Thanks, Thibault. Bill.

WILLIAM E. KOVACIC: Daryl, could I make one comment on the implication of the developments that Angela just referred to? That is, I see a tremendous amount of pressure building on the new leadership of the US agencies, both the acting chairwoman Rebecca Kelly Slaughter and the person to be named for the Department of Justice, a tremendous amount of pressure to reformulate the goals of the US system. I think it means that they will no longer be outwardly speaking about consumer welfare because it does have so much fright attached to it. I think they're going to be speaking in broader pluralistic terms about goals.

In particular, I would predict by the end of the year, the US will start going on a global apology tour, basically, to say for the last 40 years, we have misled you by our own formulation of what we think the purposes of the antitrust laws are and we will be the last to tell you that your own distinctive views about what you should do is improper. In short, do what you want and do a lot of it.

DARYL LIM: We're going to come back to what antitrust is going to look like in the Biden administration in just a moment. Damien, I want to give you a chance to weigh in, and then we'll get to the point that Charlotte mentioned earlier about the Klobuchar Bill which actually ties in with the antitrust reform that Bill was talking about. Damien.

DAMIEN GERADIN: Perhaps just to respond to Bill. In fact, I think people will not care very much about that global tour because when I started 30 years ago, we were all looking at the US and we were using US case books and reading US cases and the main antitrust scholars were all American. It has changed. I think that unfortunately, or fortunately–who knows, it depends on your viewpoints–US antitrust has become largely irrelevant as a global standard. I think that the European model has become more prominent and I think it's not necessarily because it's better, but simply because it's more adaptable.

An agency-based model which is more interventionist in nature is probably more attractive to many nations than the US system, which is more litigation-based. Anyway, it's a bit of a digression. Now let's speak about digital platforms and what's happening in Europe. Well, I think that unlike in the United States for the past 15 to 20 years, we've had a lot of antitrust enforcement when it comes to digital platforms, starting with Microsoft in the 1990s, which led to the famous decision adopted from 2003,[14] and since then it never really stopped. We've had three Google investigations with three infringement decision[15] and fines. There's still a couple of Google investigations pending. We've got an investigation against Apple, we've got two against Amazon, one

[14] Commission Decision, 2004 O.J. (L 32) 23.

[15] Summary of Commission Decision of 27 June 2017, 2018 O.J. (C 9) 11; Summary of Commission Decision of 18 July 2018, 2019 O.J. (C 402) 19; Summary of Commission Decision of 20 March 2019, 2020 O.J. (C 369) 6.

against Facebook. I'm just mentioning the EU level. I'm not mentioning the member states, because if you add the member states you can probably add another 10 to 15 investigations against the big platforms.

All these investigations and decisions essentially follow the same model, which is one of so-called vertical leveraging, which is that the theory of harm is that you've got a platform which is dominant on an upstream market. It can be Search, it can be the App Store, it can be whatever, and it will leverage its market power upstream in order to distort competition downstream. This is, for example, the claim made by Spotify in its complaint against Apple, which is that Apple would be using its control of the App Store to distort competition on the downstream market for music streaming. That's basically the main theory of harm.

Now, what is not so well-known is that despite all this enforcement there's a general view in the EU that antitrust enforcement has been unsuccessful to tame the platforms. In particular, the two main Google decisions, which are the Shopping decision[16] and the Android decision,[17] didn't do very much. They achieved very little because the remedies were weak and not very well enforced. Therefore, I think there is a growing consensus that antitrust is not the right tool if you want more competition in digital markets.

One other thing that is often referred to is that competition or investigations are very slow. They're slow for obvious reasons, which is that you have to do a number of things in order to establish an infringement; which is to define markets, to establish dominance, to do an effects-based analysis to look at possible objective justification. This takes a lot of time. This is very complicated, and therefore it might not be the right tool if you need a quick remedy to a problem. In the past few years, the thinking has shifted towards adopting what we call often *ex ante* legislation, which would be a regulatory framework that would apply before the harm is created; that's why it's called *ex ante*.

We've got two major proposals: one in the EU, the other one in the UK. The one in the EU is the proposal for Digital Markets Act[18] or DMA proposal, and there are three main pillars in that proposal. One is that it would apply only to designated gatekeepers. There are a certain number of criteria for a gatekeeper to be designated, essentially quantitative criteria, although it's a presumption-based system, so even if you meet the quantitative criteria you can still try to prove that in fact, you're not a gatekeeper.

Then there would be a list of 18 obligations that designated gatekeepers would have to comply with. Many of them find their root in competition cases such as, for example, self-referencing, some form of tying, and so on and so forth. Then there's a centralized enforcement system, in that it would be the European Commission that would designate the gatekeepers, and if the gatekeepers do not stick to their obligations, would basically go after them.

That's the European model. It's an intellectual revolution in the sense that it's not competition law. It's not intended to be competition law because the idea is basically to make things simpler in the sense that you don't have to define

[16] Summary of Commission Decision of 27 June 2017, 2018 O.J. (C 9) 11.

[17] Summary of Commission Decision of 18 July 2018, 2019 O.J. (C 402) 19.

[18] *Commission Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM (2020) 842 final (Dec. 15, 2020).

markets, show dominance. The criteria are different. There's no reference to consumer welfare. The Commission doesn't have to do an ethics-based analysis, so we switch for a regulatory framework than any sort of competition framework. Now we can discuss whether or not it's a good idea. I just wanted to point out that this is, of course, very different from competition law. Perhaps it belongs to competition policy, but certainly not competition law.

DARYL LIM: That's a good point to pause and take as a segue to briefly talk about the Klobuchar Bill, because I think it also contains provisions which mirror what you just described, Damien. Let's let somebody just very quickly tell us what are the key essentials in the Klobuchar Bill, and then what are the chances it actually will pass in Congress?

Did you raise your hand to answer that question, Angela, or did you want to say something else?

ANGELA ZHANG: No, I actually want to weigh in on a few points that Damien addressed [crosstalk].

DARYL LIM: Just hang on. Let's focus on that question first, and then we'll come back to Damien.

THOMAS B. NACHBAR: Well, I think, actually, one of the interesting things about the Klobuchar Bill is what you think the key provisions are depends on how you read it. It purports to change the standard for mergers under Section 7,[19] which would be a pretty significant change from substantially lessening competition intended to create a monopoly to appreciable risk of materially lessening competition. I think that's probably the most sort of-- Well, I don't know. It also adds a new exclusionary conduct defense[20] in Section 26a of the Clayton Act[21] as well.

I think it's hard to know what changes like that are going to mean. Appreciable risk of materially lessening competition seems to me to be a clear signal to courts to tighten the standard, but also seems to me to be a standard that's an interpretable standard. The bill relies on a number of presumptions. It sort of has a love-hate relationship with relevant markets at some level, in that it in some cases relies more heavily on market definition and presumptions with regard to market share, and in other places obviates the requirement to engage in market definition.

It does a lot, and I think that down to right establishing, trying to define the idea of industrial disruption, which I think is something that we've been talking about all along. Charlotte's point about quality versus innovation, I'm not sure there's a quality case that's not about innovation, or really more an innovation case that's not about quality. I'm not sure how closely or how much you would distinguish between the two of them. It seems to try to take both to make some fundamental changes about antitrust, but then also really tries to, in some cases, be very, very specific in its provisions.

For instance, it basically, I think, tries to overrule the *American Express* case[22] with regard to the harm that multi-sided market platform providers, basically, whether or not they have to harm more than one side of the market. As a result, I've stopped prognosticating about the likelihood that provisions are

[19] Competition and Antitrust Law Enforcement Reform Act of 2021, 117th Cong. § 7 (2021).

[20] *Id.* § 9.

[21] 15 U.S.C. 12 et seq.

[22] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

going to pass because the only thing that's consistent about that is my inaccuracy. It does seem to capture a bunch of pretty disparate ideas together, some of them really quite broad, that I think could prompt some interesting conversations.

Some of them very specific, and I think that really go to the kinds of problems that Charlotte and Damien were talking about that are specific to these providers. You have to wonder whether you're going to see those changes happen through the antitrust law as this bill would sort of suggest, or if they're going to happen in other ways. It's not static. If there is more robust privacy regulation or data regulation, generally I would foresee a lot of the pressure for these changes to platforms changing, at least with regard to competition law.

Again, I think how you look at the Klobuchar Bill depends a little bit on what you find in it that's interesting. From my perspective, it really seems to try to get at some pretty disparate problems, some of them fundamental, and some of them really quite specific.

DARYL LIM: All right. Thanks, Tom. I'm going to go to Angela and then after that, I'm going to take one question from the Q and A on data management. If you want to have a quick look at that, you can have a look at that while Angela answers. Angela, what was your point?

ANGELA ZHANG: My point is actually a reaction to both Damien, Tom, and Charlotte. All your points are about competition law. We need some fundamental changes to competition law. Right now, there's so much dissatisfaction with it. Some jurisdictions like EU or others are moving towards a completely different sphere such as increased regulation to deal with this. I just wonder two things. Instead of thinking about regulation, can we also think about, for instance, greater international competition?

For instance, in the Facebook example, Facebook did fear the competition from a Chinese company, ByteDance, which owns TikTok, and that was deemed a very fierce competitor to Facebook. If there is potential room for welcoming more, or lowering the barriers of foreign investment and welcoming more international competition, maybe that would solve some of the competition issues that are giving us a headache today.

I'm not saying this because I was raised in Hong Kong and I advocate for China, but I do think that the Chinese tech giants– because if you look around the world, only the United States and China have fostered tech giants, and Chinese companies, especially those in the consumer internet businesses have become fierce competitors. If you let these companies go on the global stage and compete with the US Big Tech, I don't think it's a clear black and white situation in which we watch to see which player ultimately wins the competition scene. I think we need complete out-of-the-box thinking of what we can do to try to inject more competition into the space here.

On Damien's point about creating more regulation for Big Tech; I'm just worried that actually, it might make them even stronger. What doesn't kill them makes them stronger because they already have deep pockets, they have good compliance teams, so they can do better than other smaller players.

DARYL LIM: All right. Thanks, Angela. Very quickly, if you want, Charlotte, do you want to answer [crosstalk] that question from the audience? Okay, go ahead. Then we'll move on to AI. Go ahead.

CHARLOTTE SLAIMAN: Daryl, I wanted to respond to Angela's last point about the idea that regulation might make the platform stronger. This is

an argument that I hear a lot in our US discussions. I think it's something that we should take seriously, but it's not the end of the conversation. There are really important pro-competition regulations that are really actually targeted at having the opposite effect. I think there is in the US sometimes a knee-jerk reaction that any kind of regulation is going to protect monopolies.

The regulations that we are talking about, very similar to what Damien was talking about in the EU context, are really going to promote competition and target monopolies that the platforms have and the gatekeeper power that they have. We're very carefully trying to target them to not have that effect.

Just to respond to the sort of back and forth that Tom and Damien were having about antitrust and regulation or competition law and competition policy, I really think it's not an "either/or," it's a "yes/and." I think that also applies there to the next question about privacy. We need both new privacy laws, we need antitrust reform, and we need these pro-competition regulations. This is a huge problem, and so we're going to need to use all of these tools to address that [crosstalk].

DARYL LIM: All right, thanks. Any final thoughts about digital platforms before we move on to AI?

THIBAULT SCHREPEL: Yes.

DARYL LIM: Yes, Thibault.

THIBAULT SCHREPEL: I agree, but only partially. If you take the DMA, it's a good example, it will probably reinforce competition between big platform and startups if they can access the infrastructure. However, let us say that I'm Facebook and I want to come up with a new search engine, and to put a good one in the market will use the data coming from facebook.com. Well, I cannot do that with the DMA, meaning that it may protect Google's dominant position in that market, meaning that the competition between the tech giants may actually be reduced because of the DMA. I think it's very complex, especially if you consider all of the different levels within the industry.

DARYL LIM: All right, thank you. Bill?

WILLIAM E. KOVACIC: Daryl, I'm going to try to take up the point that Tom wisely ducked, which is to predict what's going to happen. I very much like Tom's description of what the Klobuchar Bill seeks to do, which is to give a general push to the courts to be more accepting of different theories of liability. There's going to be a real difficulty for the proponents of legislative change to decide where their strategy is going to be.

There are some things in the Klobuchar Bill, such as giving the agencies more money, that probably will command broad support, but if they want to build the larger coalition, especially to tap the immediate Republican antagonism towards Big Tech, for reasons dealing more with the filtering and presentation of use, they're going to have hard choices to make about what to queue up. At least some of the Republican leadership, such as Congressman Buck in the House of Representatives, who said, "I'd like a program focused on tech--" has said a couple of other things. One is, "I don't want a big package that goes beyond Big Tech," and second, "I don't want to create a new regulatory apparatus."

I think if we're thinking about the sequencing of measures, I think we get resources first, we probably take on mergers second, abusive dominance third, and then a residual discussion about whether to give, say the FTC, rule-making authority to do more ambitious things. But as you go through that chain,

you come up with a more difficult set of coalition-building exercises in the Congress. The simple place I think they'll start is give the agencies more money, and Senator Klobuchar wants to double their budgets.

DARYL LIM: Thanks, Bill. Thibault, I see there's a question that's directed to you in the Q and A. Do you want to quickly answer that as we transition to–

THIBAULT SCHREPEL: Sure, and I'll be quick.

DARYL LIM: Go ahead.

THIBAULT SCHREPEL: It relates to your *Trinko* decision in a sense. What I was referring to is really much the relationship between Big Tech and consumers. There we have some studies regarding the choice paradox, where if you give 50 different options to consumers they will take the first one in front of them, but if you only reduce that to six, then potentially they may want to consider the different options. It's just an example proving that less choice might be good for consumers.

Again, I'm not saying this is always the case, but this is pretty much the business model of google.com, facebook.com, Instagram. They reduce choice so that you will only see information that you want supposedly. Of course, it's not as easy, but that's the idea. When it comes to B2B[23] relationships, then choice reduction, I think, takes a different nature, but then it relates indeed to *Trinko* and the duty to help your rivals and so on. This is not what I was referring to in my comments earlier.

DARYL LIM: Okay. Thanks, Thibault. Now switching gears, but also in some ways related to what we've been discussing, dealing about innovation, nascent acquisitions, and so on, is this idea that district court judges, and sometimes even the agencies themselves, have difficulty being able to quantify and administer the law because antitrust law has become so complicated.

Now enter artificial intelligence, and the question that many people are seized with, in particular an outfit at Stanford University which Thibault and Bill are both involved in, one as an advisory board member and the other one as the person heading the project, is can artificial intelligence actually help with antitrust enforcement and analysis? Thibault and Bill, why don't you start us off and tell us a little bit about this project called Computational Antitrust?

THIBAULT SCHREPEL: Happy to. I'll be very brief. Over the past 10 years, I have been reading lots of papers explaining how AI might be bad for competition. A few papers explain how it might be useful for competition sometimes, but it was really much regarding the substance of what AI is doing on the market. I thought to myself, "What about agencies using AI and, in a sense, fighting fire with fire?" Although it's a [unintelligible**]** I don't like, but I like the analogy. You read very little about that, but then I got in touch with a few agencies and they were very much interested in that. Here and there they have a few programs where they try to do it, but it's nothing spectacular for now. The CMA,[24] those have about 50 computer scientists, so I think it's fair to say it's the world leader, the FTC, the DOJ,[25] all moving in that direction as well. Very small agencies also are investigating the field. The idea of the project is to bring all of those agencies together, a bunch of academics, no money involved, whether public or private so it's purely an academic project, and to see where

[23] Business-to-business.

[24] Competition and Markets Authority.

[25] Department of Justice.

AI can help. If you take merger control it's obvious, if you take cartel detection it's also obvious. If you scrap the market you could do national language processing to analyze company documents. You could do machine learning on agencies' own case law. We published a paper where they've done that on the FTC decision, actually finding that in the pharma markets, when companies implement one practice, they tend also to implement another one which was invisible to human eyes.[26]

There is a potential, there is also a risk. Not everything can be calculated and computed, and we need to discuss when we have some computable elements and non-computable elements what do we do? There are rooms for lawyers, but the idea indeed is to at least put the subject on the table and to see what we can develop in the field. Indeed, Bill is one of the advisory board member. Maybe, Bill, the floor is yours if you want to say something.

DARYL LIM: I just also wanted to mention before Bill started that one of the many hats that Bill wears is also one that's related to the CMA. I'm glad that you mentioned that so I can recognize Bill's work at the CMA. Bill, just to tee up the question and perhaps focus it a little bit for you is, you've spent a lifetime in antitrust law, and presumably, Thibault or somebody from the project came to you knocking and said, "Hey, we have got this new thing. Would you serve as a board member?" What went through your mind and what ultimately convinced you this was something that you wanted to be part of?

WILLIAM E. KOVACIC: I should mention that I don't speak for the CMA but I certainly am informed by its experience. I think what was, to me, a brilliant intuition of Thibault's was the recognition that agencies needed much greater indigenous capacity to do good technical work in this area. Both to do an accurate diagnosis of what is taking place in these sectors, that is to know what's going on, to understand the technical developments. Not to understand them five years later but to understand them as they unfold.

Second, that agencies individually and collectively have something that might be called big antitrust data. That is, they have large bodies of experience and knowledge, but it tends to be disaggregated and not always brought effectively to bear upon the resolution of specific problems. I've certainly seen at the CMA, which has built an extraordinary capability, that there's an awareness now inside the House that this is a great asset in running specific cases, in examining developments, and interpreting those developments.

I think the brilliant feature of Thibault's initiative here was to realize that not simply was it a matter of individual initiative for specific agencies, but that if they pool their efforts, discuss techniques, methodologies, learning, that collectively they can go down the learning curve so much faster than they would otherwise. Then if they don't do this, they can talk all they want about digital regulation. All the discussions of the agencies are usually publicly filled with great assurances about how they're doing precise, careful surgery to deal with the malignancy but not any of the healthy tissue.

You can talk about that all you want, but if you do not have the team and the capacity to do that work well it's a fiction, or maybe even dangerous. I'm a big fan of the initiative.

DARYL LIM: Thanks. Two follow-up questions. One is, how does somebody–and we'll get to who the somebody is in a moment–go to these

[26] Giovanna Massarotto & Ashwin Ittoo, *Gleaning Insight from Antitrust Cases Using Machine Learning*, 1 STAN. COMPUTATIONAL ANTITRUST 16, 32–34 (2021).

agencies and sell it? What's the value proposition for them? What's in it for them? Two, who would be that somebody? Are we talking about the FTC, the DOJ? Are we talking about Thibault and his team or someone else?

WILLIAM E. KOVACIC: I think first and foremost for any initiative, whether you're deciding whether or not you want pre-merger notification, whether you want a leniency program, you have to persuade the potential adopter that it will make their lives better. That's step one. You do that by reference to things you've already done. I think one of the most effective exponents of that is someone who's done it. If you're going to buy an automobile, I suspect one thing you often do is to ask somebody who's already bought one and is using it, and ask, "What do you think?"

I think the most important sources of discussion, the proponents are going to be those who've done it, who showed that it worked, and can provide a bit of know-how about how to do it. One thing that Thibault's initiative does is to create a forum in which those ideas can be exchanged among authorities.

DARYL LIM: Thanks.

THIBAULT SCHREPEL: I simply wanted to say the agencies will send us each year a one to two-page report regarding all of the implementation of competitional tools they've been doing that year, and this will be public. That's the idea too. I think indeed it's very important even if you were to advise companies to know what the agency is doing to make sure that procedural fairness is here. If you don't understand computer science, how can you defend your clients?

We need to discuss all of that, but I wanted you to say, Daryl, don't you want to answer the question because you actually discussed that and mentioned the idea that potentially the FTC would be the better-placed agency, at least in the US, to actually take AI and try to use it in enforcement. Maybe the floor is yours.

DARYL LIM: Except that I try to avoid product placement. For those of you who are curious to see what Thibault is mentioning, I actually contributed a short paper on the question whether computational antitrust can succeed,[27] but this is not my time, this is the time for the panel. I'm going to invite the panel to weigh in to see if they have any thoughts in the last two and a half minutes that we have.

CHARLOTTE SLAIMAN: I'd just like to highlight Thibault's final point as he was explaining the idea that we have to be conscious of the non-quantitative measures. I think the history of antitrust that we were talking about in the beginning, the Consumer Welfare Standard, part of the problem that we're facing is there are components of the Consumer Welfare Standard that are easier to quantify, and courts have come to rely more on those.

I'm glad that Thibault is already thinking about this concern, but it's something that I'd be very concerned about that we have this, perhaps in the future, very effective great AI that is telling us so much about these quantitative measures. I wouldn't want the non-quantitative measures that I think are probably still very important to be left out and not considered as strongly. I'm glad you're thinking about that and I hope [crosstalk].

DARYL LIM: Thanks, Charlotte. Anyone else? Tom, Damien, Angela?

[27] Daryl Lim, *Can Computational Antitrust Succeed?*, 1 STAN. COMPUTATION ANTITRUST 38 (2021).

THOMAS B. NACHBAR: I'll just reiterate something that Charlotte said. Earlier in the conversation, we were talking about innovation as opposed to price and output effects, and I think she makes a good point. Some of the things we didn't talk about, for instance, like the political dimensions of antitrust, are even further detached from what are readily observable quantitative factors. One of the views of the Consumer Welfare Standard is that it's only about price and output. I actually think that that's an oversimplification, and that actually that idea was reaffirmed by the panel today.

To the extent that that has captured, I think the perception of the Consumer Welfare Standard as opposed to its practice make these kinds of efforts a little similar. It'll be really interesting to see what happens because I also know that computer scientists are incredibly smart about this and that social scientists are smart, and there are a lot of observable characteristics that don't represent quantities that are quantifiable. I think it's going to be really fascinating to see how this field develops, and I'm looking forward to Thibault and Bill's work in this, and Daryl's. I'm looking forward to the initiative and people who are working in the area.

DARYL LIM: Thanks, Tom. Okay, we have five seconds left.

WILLIAM E. KOVACIC: Daryl, if I can just provide a bit of assurance on this. Part of it is to develop mechanisms to simply identify and understand what you've done in the past in the area of innovation. Maybe on this panel there are some, but I don't know how many people have studied the case of Cytyc/Digene at the FTC in the early 2000s,[28] which was almost a pure innovation case. At the earliest stages of the R&D pipeline, 50 transactions involving Defense and Aerospace where innovation was front and center.

I don't know how much the agencies have taken on and understood about the know-how and insights they developed. It's not just about crunching numbers; it's about bringing to bear the larger experience you've had to solve the problems you have now. If you can do that you're far better off than trying to learn it all over again from ground one.

DARYL LIM: Thank you, Bill. Now I think you can see why I thought that "War and Peace" might be an apt title for this panel. It's just as eternal and complicated as it is, but thank you for taking us through all of these issues, and I hope you enjoy the rest of the conference. Thank you.

[28] *See* Press Release, Fed. Trade Comm'n, FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp. (June 24, 2002), https://www.ftc.gov/news-events/press-releases/2002/06/ftc-seeks-block-cytyc-corps-acquisition-digene-corp.