THE HOUSE TECH REPORT: AN AMBITIOUS PLAN OR A STARTING POINT FOR INCREMENTAL REFORM?

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I. INTRODUCTION

The long-awaited report on competition in digital markets by the majority staff of the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (the "Report")[2] has now become the focal point of discussion for significant potential antitrust reform in the United States. The legislative conversation about the proper role of antitrust enforcement in the U.S. economy and the most effective ways to address concerns about the state of digital markets is still at an early stage in the United States and stands in contrast to the more concrete legislative initiatives that have emanated from other jurisdictions such as the European Union and Australia. But while the Report, which reflects growing criticisms of the effectiveness of current U.S. antitrust law, sheds little light on the precise contours of the legislative proposals that are expected to follow, it will undoubtedly lead to a robust dialogue in the next Congress. Whether that dialogue results in actual reform remains to be seen. At the very least, the Report's far-reaching proposals provide a broad menu from which Congress may be able to find some common ground.

II. PROPOSED LEGISLATIVE REFORMS

Likening digital markets to regulated industries, the Report recommends that Congress consider a series of broad "market-wide" reforms designed to address what it identifies as harmful conduct and "features of digital markets that tend to tip the market towards concentration."[3]

A. Structural Separations to Address Conflicts of Interest

Perhaps the most divisive of the Report's recommendations are two proposals aimed at addressing potential conflicts of interest that may arise when platforms compete with companies in adjacent markets that rely on them to access users. According to the Report, such conflicts of interest may involve dominant platforms (1) misappropriating the data of competitors that rely on their platforms; (2) using their dominance in one line of business as leverage when negotiating in an unrelated line of business; (3) tying products and services that leads to lock-in for users and minimizes competition; and (4) relying on profits from markets that they dominate to facilitate their entry into other markets.[4]

To address these conflicts of interest, the Report recommends structural separations prohibiting a dominant platform from operating in markets that "place the intermediary in competition with the firms dependent on its infrastructure."[5] This proposed structural separation can take two forms. An "ownership" separation, would require "divestiture and separate ownership of each business." The other would allow a single corporate entity to operate in multiple lines of business but would require "functional" separation of lines of businesses.[6]

The Report touts the administrability of market-wide regulations imposing structural separation requirements as compared to case-by-case enforcement: "By setting rules for the underlying structure of the market—rather than policing anticompetitive conduct on an *ad hoc* basis—structural rules are easier to administer than conduct remedies, which can require close and continuous monitoring."[7] But it does not address in any meaningful way the potentially harmful impact of imposing such blunt restrictions, noting only that some experts have cautioned that implementing structural solutions to address conflicts of interest can be challenging and costly, particularly in dynamic markets. Nor does the Report provide a clear roadmap as to what specific legislative measures might look like and instead merely cites to experts that have suggested looking to business-initiated corporate restructuring and divestitures as a guide to designing and implementing successful break-ups.

B. Nondiscrimination Rules to Guard Against Self-Preferencing

The Report also suggests the imposition of behavioral rules to address concerns that self-preferencing may provide market leaders with an unfair advantage. Where a platform is "the only viable path to market," the Report says, a dominant firm's prioritization of its own products or services, or its preferential treatment of business partners, puts competitors at a significant disadvantage in the marketplace. The Report recommends that Congress impose nondiscrimination rules such as requiring dominant platforms to "offer equal terms for equal service" as regards to both price and access to ensure fair competition and

2 U.S. House, Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, Majority Staff Report and Recommendations, Investigation of Competition in Digital Markets (2020) (hereafter the "Report").

3 *Id.* at 378.

4 *Id.* at 378-79.

5 *Id.* at 379.

6 *Id.* at 380.

7 *Id.* at 381.

promote innovation online.[8] Noting the successful use of non-discrimination rules as applied to network monopolies in the transportation and communications industries, the Report argues that the application to digital markets is a logical next step as technologies evolve.[9]

C. Interoperability and Portability Standards to Facilitate Entry

Barriers to entry in digital markets, such as network effects and switching costs that disproportionately advantage dominant firms, are another set of concerns identified in the Report.[10] As described in the Report, digital platforms that are not interoperable with competing networks impose high switching costs on users, resulting in lock-in that benefits the dominant platform. The Report considers social networks, mobile phone operating systems, and online commerce platforms as particularly susceptible to user lock-in.

To reduce switching costs, the Report recommends that Congress consider developing interoperability and portability standards "to encourage competition by lowering entry barriers for competitors and switching costs for consumers."[11] Noting that interoperability is a core feature of email and other online services, the Report suggests that an interoperability requirement allowing competing platforms to interconnect would minimize network effects, lower switching costs, and mitigate the impact of market power.[12] The Report considers an interoperability requirement to be a complement to vigorous antitrust enforcement efforts, rather than a substitute for them.[13]

Another proposed solution to address high switching costs is data portability, which the authors of the Report see as a means of helping alleviate the costs incurred by users that leave a dominant platform. The Report notes that "consumers experience significant frictions when moving to a new product"[14] which can reinforce a dominant platform's market power. One example is the difficulty of migrating user data from one platform to another, which can result in a user being unwilling to move to a competing platform despite other attractive features offered by the competitor. The Report also endorses tools that would allow consumers and businesses to easily port or rebuild their social graph, profile, or other relevant data on a competing platform."[15]

D. Establishing Presumptions Against Digital Platform Mergers

Many of the Reports' proposed reforms are intended to increase antitrust litigation or make enforcement easier for either the agencies or private plaintiffs. A number of proposals would establish presumptions against certain mergers, putting the burden on defendants to justify their mergers rather than requiring the government to prove a merger may substantially lessen competition. For example, the Report recommends codification of the presumption in *Philadelphia National Bank* that mergers resulting in a significant increase in concentration are unlawful.[16] Legislation codifying the presumption would mitigate the risk that a court would not give due consideration to that presumption in assessing the likely competitive effects of a merger.

With respect to digital platforms, however, the Report goes a step further. It recommends that "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion."[17] Unlike the structural presumption noted above, this presumption would apply to any acquisition by a dominant digital platform, even if the acquisition was in a different market or did not otherwise increase concentration. And it is unclear how the presumption could be overcome: how would a platform show the

8 *Id.*

9 *Id.* at 382-83.

10 *Id.* at 384.

11 *Id.*

12 *Id.* at 385.

13 *Id.* at 386.

14 *Id.*

15 *Id.*

16 *Id.* at 392; see also *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 346 (1963) (holding that a merger that will significantly increase concentration in the relevant market should be found presumptively unlawful). Such a presumption is also reflected in the DOJ and FTC 2010 Horizontal Merger Guidelines. See Horiz. Merger Guidelines, Section 5.3. Although the agencies have had success advocating that courts should follow the Guidelines as persuasive authority, by their terms the Guidelines set forth the agencies' approach to analyzing mergers rather than the standard applicable to courts.

17 Report at 388.

transaction was "necessary" to serve the public interest? How would a platform show that it could not achieve similar benefits through internal growth and expansion? Does the platform have to show it could not achieve such benefits at all, or only that such internal growth and expansion would be prohibitively expensive or time consuming? Moreover, why couldn't a platform overcome the presumption simply by showing that the acquisition is not likely to substantially reduce competition?

The Report would also codify "a presumption against acquisitions of startups by dominant firms, particularly those that serve as direct competitors, as well as those operating in adjacent or related markets."[18] The Report would clarify that the agencies would not have to prove that "the potential or nascent competitor would have been a successful entrant in a but-for world."[19] But the Report leaves unstated what a defendant could show to overcome this presumption.

E. Increased U.S. Agency Enforcement

In addition to these proposed legislative changes, the Report suggests that the current laws have not been adequately enforced. The Report proposes two categories of solutions to this problem beyond the modifications discussed above.

First, the Report claims that Congress has not played an active enough role in ensuring that the antitrust laws are robustly enforced. The Report criticizes Congress for "deferring largely to the courts and to the antitrust agencies in the crafting of substantive antitrust policy" over the last several decades.[20] This abdication, according to the Report, has been interpreted by the courts as "acquiescence to the narrowing of the antitrust laws" which has had the unintended consequence of making antitrust "overly technical and primarily dependent on economics."[21] To remedy these shortcomings, the Report recommends that Congress "revive its long tradition of robust and vigorous oversight of the antitrust laws and enforcement, along with its commitment to ongoing market investigations and legislative activity."[22] In addition to proposed legislation, we are likely to see more Congressional investigations and hearings on competition issues as well as more public pressure on the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") to bring more enforcement actions. Congressional fact-finding could also pave the way for more private enforcement actions.

Second, the Report alleges that "the antitrust agencies consistently failed to block monopolists from establishing or maintaining their dominance through anticompetitive conduct or acquisitions."[23] More pointedly, the Report claims that the FTC and DOJ have "constrained their own authorities and advanced narrow readings of the law" for decades.[24] The Report complains that the DOJ and FTC have "chosen to stop enforcing certain antitrust laws entirely" such as the Robinson-Patman Act.[25] To fix this, the Report suggests increasing the agencies' budgets to give them the resources they need for vigorous enforcement. Moreover, it recommends significant new responsibilities for the agencies, such as a requirement that they solicit *and respond to* public comments on merger reviews as well as provide written explanations of all enforcement decisions; a requirement that the FTC regularly collect data and report on concentration in various sectors of the economy; and mandated "merger retrospectives on significant transactions consummated over the last three decades." The Report would also create "stricter prohibitions on the revolving door between the agencies and the companies that they investigate."[26]

Finally, the Report also complains that the FTC "has been reluctant to use the expansive set of tools with which Congress provided it," noting in particular the use of Section 5 as a standalone antitrust statute and the fact that the FTC has not used its rulemaking authority to promote competition.[27] The Report states that the agency has brought only one case under its Section 5 authority — its case against Qualcomm — but ignores that the Commission has resolved other Section 5 cases, such as those relating to invitations to collude — with consent de-

18 *Id.* at 394.

19 *Id.*

20 *Id.* at 400.

21 *Id.*

22 *Id.*

23 *Id.* at 401.

24 *Id.*

25 *Id.* at 402.

26 *Id.* at 403.

27 Report at 401.

crees.[28] And in 2015, the Commission issued a Statement of Enforcement Principles, explaining that the agency was likely to bring Section 5 cases to challenge conduct that harmed competition or the competitive process, but that was not likely to be captured by the Sherman or Clayton Act.[29] Invitations to collude fit that description; exclusionary or anticompetitive conduct by a large firm (even if not a monopolist), for example, could fit that description as well. The FTC certainly could bring such cases to expand and define its Section 5 authority without further legislation. There is also the possibility that the FTC could engage in rulemaking in the competition arena, as it does pursuant to its consumer protection authority.[30]

F. Litigation Reform to Facilitate Private Antitrust Enforcement

The Report also seeks to enhance or expand private antitrust enforcement, generally by overriding certain Supreme Court precedents imposing prudential limits on antitrust actions. Given the well-accepted and long-standing nature of many of the Supreme Court decisions at issue, it seems unlikely those decisions could be overturned or otherwise limited without legislation. But the likelihood of such legislation seems particularly unclear, given how little the Report says about any problems caused by those decisions. Indeed, while it appears that the authors of the Report believe certain Supreme Court decisions have impeded useful private actions, they generally do not say why or how or how much.

And it is hard to understand why certain proposed reforms are in the public interest. For example, the Report recommends eliminating "court-created standards for 'antitrust injury' and 'antitrust standing,'" citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977) and *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983). The Report says those decisions "undermine" Congress' granting of a private right of action to anyone injured "by reason of anything forbidden in the antitrust laws."[31] But the antitrust injury requirement separates those who were injured by a reduction in competition from those who were not. Thus, in *Brunswick*, a group of small bowling alleys challenged Brunswick's acquisition of certain failing bowling alleys.[32] By buying the failing bowling alleys, Brunswick increased competition, lowering prices and giving consumers an additional choice for where to go bowling. Thus, the acquisition was pro-competitive — but it harmed plaintiffs, who would earn higher profits if the failing bowling alleys simply went out of business.[33] The Supreme Court rejected the plaintiffs' antitrust claim, finding that any injury was not caused by an unlawful reduction in competition — i.e. something "forbidden in the antitrust laws" — and thus was not injury of the sort contemplated by the statute.[34] Thus, while overturning *Brunswick* may well increase private antitrust litigation, It is unclear that doing so would increase any type of private litigation that would benefit consumers.

Similarly, *Associated General Contractors* imposes limits on standing based on common law principles of remoteness, proximate cause, and directness of injury that apply throughout our jurisprudence.[35] Thus, plaintiffs challenging an alleged conspiracy to fix the price of eggs, for example, might include wholesalers or retailers who bought eggs directly from the allegedly conspiring producers. State antitrust laws might allow claims by consumers who bought eggs from a grocery store. But standing limitations might block a consumer who bought an omelet at a restaurant, a consumer who bought a cake from a bakery, or a company that produces egg cartons and sees its sales decline. Again, it is unclear why standing principles that apply throughout our common law to maximize claims brought by the most aggrieved plaintiffs, while avoiding duplicative recoveries, difficulties of proving or apportioning damages, and over-clogging courts, should not apply to antitrust. Nor does the Report explain how such basic standing principles reduce any private antitrust enforcement that we, as a society, would want to encourage.

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28 See, e.g. *Decision and Order, In the Matter of Fortiline, LLC, Dkt.* No. C-4592 (Sept. 23, 2016); *Decision and Order, In the Matter of Drug Testing Compliance Group, LLC,* Dkt. No. C-4565 (Jan. 21, 2016); *and Decision and Order, In the Matter of Motorola Mobility LLC and Google Inc.,* Dkt. No. C-4410 (July 23, 2013).

29 Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, April 13, 2015.

30 See *Rohit Chopra & Lina M. Khan, The Case for "Unfair Methods of Competition" Rulemaking,* 87 U. Chi. L. Rev. 357 (2020); Jonathan B. Baker, Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory, 38 Antitrust Bull. 143, 207 (1993).

31 *Id.* at 404.

32 See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477.

33 *Id.* at 477.

34 *Id.* at 488.

35 See *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519.

The Report also calls for "eliminating . . . undue limits on class action formation," citing *Comcast v. Behrend*, 569 U.S. 27 (2013).[36] But again, the Report does not explain the basis for its concern. In *Comcast*, the plaintiffs proposed a damages model that calculated aggregate damages from four different theories of harm.[37] The court, however, found that only one theory of harm was susceptible of class wide proof sufficient to support a class action.[38] Because the model could not distinguish between, or disaggregate, damages based on one theory of harm from another, plaintiffs were unable to prove damages with common evidence, and a class could not be certified.[39] Again, the Report does not say that *Comcast* was wrongly decided, or explain how *Comcast* unduly limits class actions. Is it that plaintiffs should be able to support class certification without showing that they can prove their claims with predominantly common evidence? The Report does not say.

The Report also calls for "[l]owering the heightened pleading requirement introduced in *Bell Atlantic Corp. v. Twombly*."[40] But Twombly did not impose a "heightened" pleading standard for antitrust cases.[41] It merely clarified that Rule 8 of the Federal Rules of Civil Procedure requires enough factual pleading to show that the plaintiff had a plausible claim.[42] The Report does not provide evidence that *Twombly* has prevented the filing of credible antitrust claims or otherwise hampered private enforcement that ought to be encouraged. Presumably, the Report does not seek to increase implausible or meritless antitrust claims. And the Supreme Court has clarified that the Twombly pleading standard applies to all claims in federal court, not just antitrust claims.[43] It is unclear if the Report advocates a lower pleading standard for antitrust claims as compared to other claims, and if so, why.

While most of the recommended reforms would require legislation, a few would not. For example, among the "Additional Measures to Strengthen the Antitrust Laws" identified by the Report is a call to override *United States v. Sabre Corp.*, 452 F. Supp.3d 97 (D. Del. 2020) to clarify "that platforms that are 'two-sided,' or serve multiple sets of customers, can compete with firms that are 'one-sided.'"[44] But the Third Circuit has already vacated that decision.[45]

Similarly, the House Report calls for "Rehabilat[ing] Monopolization Law" by, among other things, "clarifying" tying law — but tying by a dominant firm is already a basis for a monopolization claim, as the Report acknowledges.[46] To the extent any clarification is actually needed, it is unclear why the agencies could not bring cases to seek this clarity.

III. WHAT'S NEXT?

What then is the likelihood of Congress passing legislation that addresses the Report's concerns about competition in digital markets? A separate report issued by Republican House member Ken Buck provides a glimpse into the areas that may form the basis for bipartisan legislative proposals.[47]

The Buck Report suggests potential bipartisan support for legislative recommendations "empowering consumers to take control of their data through data portability and interoperability standards" and shifting the burden of proof for companies pursuing mergers and acquisitions.[48] However, other proposals are viewed as "non-starters."[49] For example, there is unlikely to be bipartisan consensus with respect to structural separations and nondiscrimination rules.[50] Rep. Buck instead advocates that the subcommittee "evaluate tailored and targeted proposals to

36 Report at 404.

37 *Comcast v. Behrend,* 569 U.S. 27, 31.

38 *Id.* at 28.

39 *Id.* at 35

40 Report at 404, citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007).

41 *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 547.

42 *Id.* at 556.

43 *Ashcroft v. Iqbal,* 556 U.S. 662, 684 (2009).

44 Report at 399.

45 See *United States v. Sabre Corp.,* No. 20-1767, 2020 WL 4915824 (3d Cir. July 20, 2020).

46 Report at 398.

47 See *U.S. House., Rep. Ken Buck,* The Third Way (hereafter the "Buck Report").

48 Buck Report at 5.

49 *Id.* at 16.

50 *Id.*

ensure Big Tech firms are not using their market-dominant positions to crush competition in other lines of business."[51] The Buck Report also takes issue with the notion of a broad regulatory regime" to prevent platforms from self-preferencing, arguing that such regulation "will only serve to crush innovation and stymie the creative market."[52] Finally, Rep. Buck rejects recommendations to change pleading standards and prohibit arbitration clauses in contracts that the majority considers to be barriers to private antitrust enforcement, instead advocating that the subcommittee focus on legislation that removes barriers to agency antitrust enforcement rather than private enforcement.[53]

It may be, then, that rather than ushering in major antitrust reform in the United States, the Report provides a starting point for more modest, incremental changes to U.S. antitrust law. ■

51 *Id.*

52 *Id.* at 17.

53 *Id.* at 17-18.