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Antitrust Enforcement in the Digital Age

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I. Introduction

Thank you for having me. In my remarks today I will discuss a topic that seems to be much in the press these days: the proper role of antitrust enforcement in an increasingly digital world.

There has been much rhetoric about the integration of modern, digital technology into the global economy. My goal today is to put these developments into a richer context in terms of history, law, and government philosophy.

Today, across many sectors of the world economy, we see a trend towards the digital mediation of economic activity. In brief, we are moving from an economy where people tended to control production and consumption decisions directly and towards an economy where those same decisions are frequently mediated or assisted by new, digital tools. Humans are still

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

making the high-level decisions about what to make and what to buy, but various forms of digital technology increasingly assist and improve upon those decisions.

Some of these new digital mediation tools are platforms, where producers and consumers use the same system but for very different purposes.² For example, eBay provides an electronic platform where sellers and buyers connect with each other. Because eBay has two distinct sets of customers, it must build an online ecosystem that is amenable to the sometimes conflicting needs of both buyers and sellers if it is to succeed. In economic terms, this makes eBay a two-sided market, because both buyers and sellers have independent demand for the platform.

Some of these online platforms can experience network effects.³ For instance, if more sellers advertise on eBay, the increased variety of sellers make it a more attractive place for buyers. Similarly, if more buyers are looking for things on eBay, it becomes a more attractive place for sellers to list their wares. If the network effects are strong enough there may be only a small number of firms that succeed with a particular platform.

As the costs of powerful computers, sophisticated software, and ubiquitous high-speed connectivity have all fallen, it seems as if digital mediation is poised to reshape every corner of the economy. But the adoption of these changes is not always neat and orderly. Innovative new business models can explode onto the scene, forcing incumbent firms to adapt rapidly or yield to the brash, young upstarts. As technological advancement builds upon new technological advancement, the rate of change can become daunting.

² See FED. TRADE COMM'N, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS: A FEDERAL TRADE COMMISSION STAFF REPORT 3 (2016), <https://www.ftc.gov/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission>.

³ *Id.* at 19-20, 26-28.

As our increasingly technology-laden economy drives forward, some worry that things are getting out of hand. There is fear in some quarters that we are spiraling towards a dystopian future where a few giant technology companies will ultimately gain sustained control over our economic lives.⁴

Some people are so concerned about this that they want to rewrite the modern rules of antitrust enforcement. In their view, current events have overtaken the hard-won political consensus that antitrust should principally focus on protecting consumers. In this new, digitally mediated world, they argue, we must recast the rules of antitrust to intervene more aggressively in markets to pursue a wide variety of goals other than consumer welfare.

Given the clear consumer benefits of technology-driven innovation, I am concerned about the push to adopt an approach that will disregard consumer benefits in the pursuit of other perhaps even conflicting goals. But believing that consumer welfare is the appropriate goal of antitrust does not mean being passive or embracing the view that antitrust in the pursuit of consumer welfare cannot be improved. Antitrust law has changed as our understanding of market dynamics has gotten more sophisticated, and it should continue to evolve as we refine our predictive tools. If those tools suggest that competition will be harmed and consumers made worse off from the behavior of any firm, even a platform, antitrust enforcers should act.

With that said, I do believe that today's antitrust can confront meaningful competitive harm in the modern, digitally mediated economy. But I am not only going to talk about doctrine,

⁴ See FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES 8–11, (2016), <https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report>.

I am also going to discuss a few cases that illustrate the ability of current law to evaluate and then address consumer harm in these technology infused markets.

II. Assumptions Underlying Arguments for Departure from the Consumer Welfare Standard

a. Assumptions of Regulatory Competence

So let's unpack some of the assumptions made by those who would seek a more interventionist role for competition enforcement in the technology sector. Perhaps the most troubling assumption here is that we, as regulators, can divine how these new technologies should develop and where and how they should be used. Ask yourselves whether antitrust enforcers are truly well qualified to pick the winners and losers in the modern economy.

If you want to put your faith in the hands of the regulators, think about some of the subsidiary questions you are actually asking the government to decide. Can these technology firms branch out into new markets, or must they narrowly focus on their original, core competency? When a technology company lowers prices, should that be permitted by regulators because it helps consumers or prohibited because it makes some other business less likely to succeed? How should a regulator weigh these effects against each other?

This kind of regulatory second-guessing of the market, untethered from any effort to remedy demonstrated harm to consumers, can be problematic because it displaces the

preferences of the members of the public, as expressed through market forces, with the preferences of regulators.⁵

As I have said before, regulators are just people entrusted, temporarily, with the levers of government power.⁶ We possess no crystal ball with which we can unerringly see the road ahead, and we can be just as wrong about the way the future will unfold as anyone else. In my time here at the FTC, and throughout my career, I have tried to stress the need for regulators to acknowledge the limits of their actual knowledge before exercising government power.⁷

History suggests great caution when it comes to efforts of government regulators to design the economy. When governments have engaged in central planning by picking the winners and losers in markets, the decisions they made have often turned out to be harmful to both the economic life of the country and the living standards of their people. Those who want to steer the digital economy through pervasive regulatory intervention seem to assume that regulators today will be able to get it right and balance many conflicting values despite the poor track record of central planning in much less complex markets.

b. Assumptions That Technology Markets Are Not Dynamic Such That Gaining and Maintaining Market Power Are Easy

Another aspect of this critique of current antitrust is a fear of ossification and stagnation in high technology markets, making them unresponsive to consumer preferences. The idea that

⁵ See Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, *Regulatory Humility in Practice*, Remarks at the American Enterprise Institute (Apr. 1, 2015) <https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen>.

⁶ *Id.*

⁷ *Id.* at 3.

today's leading technology firms will inevitably sustain and even increase their advantages in the future, however, is uncertain based on a review of not so distant events.

During my earlier tenure at the FTC, many voices raised concerns about the prospect of AOL merging with Time Warner. After all, AOL was a dominant provider of dial-up internet services. If AOL started favoring Time Warner content, what competitive and consumer harm could that bottleneck create? We don't spend a lot of time talking about that merger these days for obvious reasons. Nor do we spend a lot of time talking about the Microsoft/Intel dominance in desktop computing that was such a focus for antitrust at the end of the last century. The wheel turns, and technology moves forward in ways that no one expects. That is why people who work in this industry write books with titles like "Only the Paranoid Survive."⁸ They understand how tenuous a hold they often have on their current position, and that the next major shift in technology could very well leave them behind. I would suggest that before we start restructuring markets because we have lost faith in market forces, perhaps we should have more empirical evidence that these markets are losing their dynamism, innovation, and creativity.⁹

To be clear, my point here is not that harms to competition cannot possibly occur in these kinds of markets. They certainly can and antitrust enforcers should be alert for them. Rather, the real question is whether when harms do arise, are enforcers capable of addressing anticompetitive conduct by dominant firms, even in fast-moving technology markets?

⁸ ANDREW S. GROVE, ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY (1999).

⁹ See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, *The FTC at 100 [Days]*, Remarks at Kelley Drye (May 3, 2017), at 4, <https://www.ftc.gov/public-statements/2017/05/remarks-acting-chairman-maureen-k-ohlhausen-ftc-100-days>.

I believe antitrust can and should address such competitive harms and anyone who thinks otherwise should look at the very thoughtful DC Circuit opinion in the *Microsoft* matter.¹⁰ Among other things, that case teaches that under current antitrust law a dominant provider must maintain its position through legitimate competition on the merits, rather than through exclusionary conduct that has little or no purpose beyond disadvantaging rivals.¹¹ *Microsoft* stands for the proposition that monopolists can improve their products to better serve their customers just like any other market participant. But enforcers will not tolerate the use of market position to short-circuit competition on the merits. In essence, monopolists need to fend off their rivals the same way other firms do, by doing things better than the next guy. This standard leaves enforcers plenty of room to attack the kind of exclusionary conduct the antitrust laws are meant to address.

c. Harm to Some Competitors Does Not Equal Harm to Competition

Critics of the consumer welfare standard also appear to assume that the widespread digital mediation of purchasing and production decisions is not just a significant technological advancement, but something novel and, perhaps, pernicious.

History shows that most technological advances bring welcome changes, even in the face of disruption and dislocation.¹² We used to ride horses, and now we drive cars, but the basic rules of supply and demand didn't go away, even as the introduction of the automobile substantially transformed many aspects of our economy. Innovation is a constant part of our

¹⁰ See *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹¹ *Id.* at 58.

¹² See generally JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (3d ed. 1950).

economic life, so it seems reasonable to ask those seeking a new antitrust paradigm what makes the current crop of technological advancements somehow different than previous innovations.

I've certainly heard arguments about how disruptive the changes wrought by the digitally mediated economy can be to some existing business models. However, disruption and change, in the abstract, are nothing new. Rather, they are a normal, natural part of the competitive process. Free markets constantly reinvent themselves and that process inevitably shuffles the existing economic order.

When firms complain about the challenges of staying relevant and competing effectively in the modern economy, I may be personally sympathetic to the difficulties they face, but I care a great deal more about protecting the competitive process that has dropped these challenges into their laps. I make that policy choice not on the basis of some cold adherence to an abstract ideal, but because the process of entrepreneurial discovery in the free-market system over the last two hundred years has driven the greatest advancement in human living standards that the world has ever seen. Free, open, and competitive markets empower entrepreneurs to innovate and improve our lives in many ways both large and small. And, antitrust enforcers should address behaviors that undermine the competitive process underlying this cycle of innovation and consumer gains. Further, as I have long advocated, other government officials should remove regulatory barriers to market entry and competition.

Now some claim that what makes this reinvention of the economy different is that predatory pricing is widespread in the digital economy. They assert that some internet companies sell below cost to drive rivals out of markets and thereby cement their dominant market position, which network effects then reinforce.

For a predation strategy to make sense, however, a company needs to do more than just sell below cost and drive out rivals. It must somehow put itself in a position where rivals cannot easily re-enter the market once prices rise. As the Supreme Court has recognized, as long as entry remains possible, predation makes no economic sense.¹³ Thus, antitrust enforcers and courts must find evidence of a barrier that competitors cannot overcome once the price-cutting company raises prices enough to both recoup its earlier losses and to start earning supra-competitive returns.

In high technology markets, network effects can make it more difficult for new entrants to compete with incumbent firms. That is why, during any antitrust investigation, we routinely look at entry barriers including such network effects. Although the analysis in the technology sector may be different from other industries, I believe the current framework is sufficiently flexible to address these important issues, but we should continue to refine our understanding on future competitive conditions.

¹³ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

III. Enforcement Under the Consumer Welfare Standard

I now want to spend just a few minutes talking about how, as enforcers, we have handled some of the issues that these technology-laden cases commonly present.

The first case I want to discuss is the recently proposed merger of Draft Kings and FanDuel.¹⁴ The parties to this transaction ultimately abandoned their plans to merge, after the FTC sued to block the deal.

Just to briefly sketch the facts, both companies operated online daily fantasy sports platforms, which allow users to potentially win money from each other based on their ability to assemble virtual sports teams composed of real athletes. These platforms were subject to various benefits of scale, including the fact that having more players allowed the operator to run larger contests with bigger prizes.

The parties made a number of arguments about market definition and the efficiencies that would flow from their combination. They particularly stressed that the product hadn't been around a long time, that it was a nascent industry, and that it was inappropriate to judge them by the same standards that applied to more established markets.

Our investigation showed that daily fantasy was indeed a distinct market, separate from "season-long" fantasy sports, which many friends or colleagues play socially. There was also abundant evidence of significant head-to-head competition between these two platforms, with competition directly benefitting consumers. It was also clear to us that no other provider could replace the quality and strength of the competition that these two firms provided to each other.

¹⁴ See *DraftKings, Inc. & FanDuel Ltd.*, F.T.C. Docket No. 9375 (2017).

In addition, the regulatory obstacles and the importance of scale that our investigation identified strongly suggested that successful, further entry into this market was unlikely. At the end of the day, what we were left with was, in effect, a 2-1 merger.

The fact that the parties operated internet platforms didn't inhibit our ability to fully evaluate the market dynamics here. Nor did it really matter that the firms hadn't been around forever, because we had enough information to get a good sense of the current market dynamics and, more importantly, to conclude that future events were unlikely to radically alter our current view of the market. As for scale effects, not only did we evaluate them very carefully, they had a significant impact on our analysis and decision to challenge the merger.

I think what the Draft Kings/Fan Duel matter shows is that existing tools can handle novel, technology-laden markets when we identify a significant risk of consumer harm. These technology-infused markets can present complex factual questions, requiring careful attention to the actual competitive dynamics, but they do not render us powerless to redress likely consumer injury.

Now some have criticized this decision as being too reliant on structural presumptions of harm and insufficiently sensitive to the complex market dynamics presented by this case. I agree that it is important to be sensitive to over-reliance on structural presumptions in a fast-moving technology market, which can lead to false positives. In this case, however, I concluded that the carefully observed competitive dynamics pointed in the same direction as the structural analysis.

I'd now like to contrast the Draft Kings case with one that is quite a few years older. Back in 2008, the Department of Justice faced the planned merger of Sirius and XM.¹⁵ Both of these companies operated satellite radio services. Much like Draft Kings and FanDuel, the merging parties were the only significant players in their space, suggesting that if the relevant market were limited to satellite radio providers, the merger would be a 2-1. However, unlike what we recently saw in Draft Kings, it was apparent, even in 2008, that the existing market structure was unlikely to remain stable. New ways of listening to music, such as streaming services, were right around the corner, and both parties had already signed up car manufacturers to long-term deals, limiting the amount of existing competition between them. The Department of Justice ultimately allowed this transaction to go through, and I am unaware of any current complaints about the impact of this merger.

I think today the Sirius/XM merger largely stands for the proposition that we frequently need to go beyond market shares and structural presumptions and really understand the dynamics of the markets we are evaluating. We did that in Draft Kings and the DOJ took the same approach in Sirius/XM. It also shows that our tools are not inflexible and that where there is likely harm, we can find it and address it. Where there isn't, we can figure that out as well, and step back.

¹⁵ See U.S. Dept. of Justice Press Release, "Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.," Mar. 24, 2017, https://www.justice.gov/archive/opa/pr/2008/March/08_at_226.html.

IV. CONCLUSION

In conclusion, I am neither a champion of today's leading internet firms nor their foe. I have supported enforcement against a number of our biggest technology companies when I believed they violated the laws that the FTC enforces and I have opposed enforcement when our investigations have not provided sufficient support for legal action. Likewise, I have vigorously supported policy positions that they sometimes like and sometimes hate.

I believe that antitrust enforcement should always turn on the specific facts of each individual case and the likelihood of actual consumer harm. We can and should bring cases in these areas when the interests of consumers are threatened. And we should continue to refine our tools to better identify when such consumer harm is likely to occur. But my insistence on empiricism and analytical rigor does not render us weak or impotent in the face of new business models. Rather, it means our enforcement decisions pursue a clear goal: to protect free and open markets for the benefit of consumers.

Thank you again for having me.