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A Biden Administration Antitrust Midterm Report Card



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[00:00:03.540] - Scott Wallsten

Thank you all for joining us. Our third panel is titled A Biden Administration Antitrust Midterm Report Card. So either time still to turn it around or blow it, depending on your point of view. We have a great panel of experts here. Before I introduce them, just remind the audience that you can ask questions at any time. I'll try to work them into the conversation at the right moment. There are no stupid questions. You should particularly remember that when I'm asking questions. Our panelists today we have Ginger Jin from the University of Maryland, who is the former director of the Bureau of Economics at the FTC, Carl Shapiro at UC Berkeley and former chief economist of the DOJ Antitrust Division. Larry White, NYU Stern School of Business and former also former chief economist at DOJ Antitrust and Koren Wong-Ervin, who's currently at Axinn and former attorney advisor at the FTC. Thanks to all of you for joining us today. Let's start off setting the stage. What should success and failure mean? If we're trying to grade the administration, what would we grade them by?

[00:01:22.180] - Scott Wallsten

What should we measure? What should matter and how might different groups interpret those differently? Koren, why don't you start us off?

[00:01:29.510] - Koren Wong-Ervin

Sure.

[00:01:29.990] - Koren Wong-Ervin

Thanks so much to the organizers for having me. I think that's a really important question, right? What is success, failure or even neutral mean? I'm going to talk about two things that I think are really important. The first is effects on welfare, right? What are the long and short term effects on consumers, competition and innovation. This includes providing clear and predictable enforcement guidelines and enforcement so that parties can comply with the law because uncertainty can serve as attacks on transactions or otherwise chill procompetitive conduct. On this front, I'm concerned, I think the withdrawal of the merger guidelines without any replacement to date, as well as the new FTC unfair methods of competition statement, which I think is quite vague and uses unpredictable and untested standards, I'm concerned that these are contributing to this uncertainty. I'm at a law firm, I represent clients and have many clients just saying, what do I do? Do I completely change my compliance program for this new FTC policy statement that moves us away from a consumer welfare standard and sort of testable implications to more of anything that makes it more difficult for competitors to compute standards?

[00:02:51.360] - Koren Wong-Ervin

It's interesting, Aviv and Susan on the first panel this morning, talked about the importance of guidelines and Susan talked as if the merger guidelines were still in place, or at least that's what I heard and how they refer to them. It highlights the importance of them. I hope if they come out, that they come out soon so that people at least have some guidance. I think also Michael Katz referred to this, that the uncertainty can not only be in reducing incentives to invest but also the rivals, competitors, can exploit this uncertainty

to bring litigation, which can have perverse incentives of companies pulling their punches. It's not just creating noise, but it's actually biasing incentives against competing. I'll just touch really quickly on retrospectives. I think it's way too early to do any kind of retrospective of the Biden administration. And I'm not even sure you can do that right, because this isn't like a merger where you have a clear event and obvious controls. What we're looking at is more economy wide. How do these policies affect? And so maybe you have some kind of controls with other countries.

[00:04:07.300] - Koren Wong-Ervin

I don't know, but I think it's too early. But what I do know now is that I'm very concerned that returning to a sort of pre-1970s approach to antitrust is going to risk having negative effects on consumers and competition. I think that there is a lack of a reliable record that we have a systematic under enforcement problem to justify these radical changes. If we did have this rampant type one error problem, you would expect it to show up systematically in the numerous retrospectives we have, but that's not what we're seeing. So the second factor or measurement that I'll mention is institutions. The importance of institutions in terms of things like the credibility of the agencies, not just domestically, but abroad, and also moral issues, with morale very likely having effects on motivations and productivity. I think credibility comes not just from having these clear and predictable rules or enforcement approaches, but also from having an economically sound approach. I'll end on a positive or a possible positive. I think one thing that is positive or possible that the FTC has done is the creation of this new technology office. I know prior administrations had hired technologists, but really creating an office.

[00:05:34.020] - Koren Wong-Ervin

I've long said that it's really important for enforcers and regulators to understand the technologies which can just be so incredibly complex and the practical realities of how markets work. So I'll end on a positive note.

[00:05:52.060] - Scott Wallsten

Other thoughts on how we should define success and failure in this context? Context and comments on what Koren said.

[00:06:01.980] - Larry White

Let me jump in and say first I'm really pleased that none of the previous speakers talked about case counts as an indicator of vigor or lack thereof, of enforcement. Case counts are absolutely not interesting in terms of how to be thinking about enforcement. To drive this point home we don't see very many cases brought to try to convict bank robbers. Does that mean we're not enforcing the law against bank robbery? No, I think it's more likely that there aren't a lot of bank robberies going on because the penalties, the enforcement, et cetera, is quite vigorous. So case counts are just not the right way to be thinking about the vigor of enforcement. Now, in the merger area, I think there is a relatively more straightforward way of doing things, which is in some metaphoric sense, where is the line on what kinds of mergers are going to be not challenged versus what kinds of mergers are going to be challenged? That, of course, gets into things like market definition, seller concentration, conditions of entry. What about the other side of the market? All of those complex IO issues. But the issue of where is the line?

[00:07:54.800] - Larry White

What are we letting through? What are we turning back? Is the line in the right place? Now, I would differ a little bit with Koren by saying I think at least some of those retrospective studies of mergers have shown that the close calls that eventually got waived through, maybe waved through with conditions. We see price increases, significant price increases afterward. If one believes that, and I do, that to me says the line hasn't been in the right place. That we do need to, through enforcement, through bringing cases, move that line to a place where we don't see post merger price increases. That's most easily done in the merger area, in monopolization, in cartels, it's tougher to do. Ultimately the standard ought to be, as Koren mentioned, consumer welfare, competitive structure, and general improvement in wellbeing, but case counts just can't be the right way to be thinking about this.

[00:09:24.730] - Koren Wong-Ervin

Just to clarify, I wasn't saying that there's no retrospective that there's harm. I'm saying that I would want systematic before I have radical changes. And my standard isn't there's no harm ever, we should change the rule. Sorry, I think someone else is going to talk.

[00:09:50.900] - Carl Shapiro

Let me try a different approach than you've heard so far. This is what you call it a midterm report card. So as a professor, I'm used to we've been putting the syllabus; how are you going to be evaluated as a student? All of us, they think, here's how we might want to evaluate this. But this is a case of, why don't we evaluate the administration based on their own skills rather than the ones that we might choose to impose upon them or think which should apply? In July 2021, so six months into the administration, the President of the United States, in his executive order promoting competition in the American economy, stated, "yet over the past several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefit of an open economy and widening racial income and wealth inequality. Federal government inaction has contributed to these problems with workers, farmers, small businesses, and consumers paying the price." This is the President of the United States, so all the agencies have to get behind that.

[00:11:04.940] - Carl Shapiro

Certainly DOJ. FTC is independent, but let's be serious, he appointed Lena Khan as Chair. They're going to get behind it too. That's the administration. Maybe we should evaluate them based on those criteria, which I think is basically reducing consolidation and going after big business. I will add one other fact to this that I think is very important because I am now talking more about politics and economics for a moment. If you look at the survey evidence, 82% of people think that have a positive view of the impact of small business, and only 41% feel that way about large business. In fact, 38% of people have an extremely negative view of large business. Furthermore, the percentage of people who are very dissatisfied with large businesses, major companies actually this is a different survey, is 44% more than double what it was 20 years ago. I think in our antitrust world, we tend to look at, we want to do, whether it's consumer welfare or innovation, the political moment for this administration is to go after large

businesses and go for deconcentration and attack consolidation. This is very structural and this fits with where they go back to the 1960s when things were much more structural.

[00:12:26.590] - Carl Shapiro

I don't think that will work and I don't think it's a good approach. But that is how the administration is judging itself and we should not lose track of that.

[00:12:37.580] - Scott Wallsten

Let's follow up on that a little bit. I know you're not saying explicitly you don't think that's a good approach. If those are the measures that we're supposed to evaluate the administration on, how well do you think they did? I mean, they're trying to do that, but the FTC loses in court. It's not clear what sort of success they've had. By the measures that you're talking about, do you think they would consider it successful?

[00:13:06.740] – Carl Shapiro

I would distinguish short run from long run here. I think a lot of our conversation, will touch on various aspects to answer your question, Scott. I think in the short run, it seems to me the strategy particularly at the FTC, is to make it much more costly and uncertain to engage in a merger. Okay? I'm concerned that is not very much differential between whether the merger is pro-competitive or anticompetitive. If you want to stop consolidation generally, you can't block mergers. You're not the only authority, but you can make it costly. You can tell people even if you merge, we're going to review you later, you're not out of the woods. You can have it be a long review process. There's a lot of things you can do, a lot of things they are doing. One could argue there's been significant deterrence of mergers that we're not going to see in any statistics for Larry's point. I think if you talk to antitrust lawyers who counsel businesses, and I talk to them and I don't do that myself, they would say, yeah, I'm telling my clients there's a lot more uncertainty out there with many mergers.

[00:14:16.420] - Carl Shapiro

By the way, it's not just horizontal that's the other thing is it's vertical. It's, it's complementary merger areas that were much less likely to get attention. This is, I think, one reason the FTC withdrew the vertical merger guidelines for 2020. They've been much, actually surprisingly active on vertical mergers and less on horizontal at the FTC. If you think about it, sweeps up a lot larger group of deals because it's not just people who want to merge with a competitor. It's expanding upstream, downstream, complimentary. I think you could take the view that it's been a success because of deterrence, although it's hard to measure. The long run effects I'm very concerned about. I think we'll come back to that, partly because of just bad incentives but also because of setbacks in the case law. We'll come back to that too, in terms of the actual litigation outcomes.

[00:15:13.190] - Larry White

Let me just add that the kind of uncertainty that Carl has just described is exactly the sort of thing that Koren was saying is not so good. You'd like to be able to provide clients with here's where the line is, and

if you propose something that's beyond the line, you're going to get challenged. If it's clear you're not beyond the line, then it ought to go through. Whenever policy changes, there's going to be some new circumstances, there's going to be greater uncertainty. That's one of the lessons that comes out of the classic Priest Klein approach to what cases get litigated or not. That may be inevitable, but just to create uncertainty for the sake of uncertainty, no.

[00:16:08.690] - Carl Shapiro

Larry, you're assuming there are good mergers or bad mergers. You want to discourage the bad, so you want to make clear where the line is. If one takes the view that almost all mergers are bad, discouraging them all by creating uncertainty serves that goal.

[00:16:26.490] - Larry White

If Mary's Coffee Shop wants to purchase Sam's Garage.

[00:16:35.000] - Carl Shapiro

Well within the HSR reportables look, I'm just pointing out that if you have a different goal, which is to reduce consolidation and reduce mergers, the analysis is different. There was a huge merger (inaudible). We can talk about the HSR report and the HSR statistics. The fiscal year 21 they just came out with the HSR report was the largest set of mergers ever. It wasn't working then, but maybe it's been having some deterrence effect later. Scott, I'm not endorsing this. I'm just saying I think the administration may be using a different metric than we all want to use to evaluate their own success.

[00:17:14.100] - Koren Wong-Ervin

I have heard from both of the agencies, so I know for the 2022 fiscal year it was 3500 reportable transactions that could get a second request, not duplicate. I've heard that since then it started to go back to kind of normal.

[00:17:31.880] - Ginger Jin

I want to follow up on Carl's short run versus long run. When I received the topic, I was thinking what actions DOJ and FTC have taken to support real and sustainable improvement in the antitrust actions? I think their hiring of Susan Athey and Aviv Nevo is a really good thing. Both of them have very extensive antitrust and industry experience. I think we've also have a lot of government experience and they're able to bring economic research and rigorous to very much leaded error of a lot of antitrust situations to deal with. I'm really glad from the first panel to hear that both DOJ and FTC are hiring not only economists but also data engineers, data scientists and technology officers. I think in my view, DOJ and FTC were massively lacked behind in those information technology structures and they're able to move towards that direction. It could have sustainable improvement in the future, especially with the improved budget amount in the fiscal year of 2023. I also welcome the effort to look beyond price effect of mergers. I think we can debate on like what theory is right and what theory has more bites.

[00:19:03.840] - Ginger Jin

I think this discussion has raised attention to non-pricing, quality variety elevations, future entries, and I think those things at least make a lot of academic and nonacademic people thinking along those lines. On the negative side, in addition to the increased uncertainty, I feel like some actions have put the FTC jurisdiction and reputation at risk. The Supreme Court made a decision in 2021 to rule that FTC lacks authority to seek equitable monetary relief in 13(b). There are other cases, like Exxon versus FTC, at the Supreme Court now to put risk on FTC's administrative proceedings. I think those things make me concerned about the long run sustainability of the agency and whether we're moving in the right direction to improve antitrust enforcement.

[00:20:14.860] - Carl Shapiro

I agree with you Ginger, about what both Aviv and Susan said about building capabilities there. That was nice to hear. I have to say it struck me, I was thinking about how would I have answered that question when I was at DOJ, how would I evaluate my success? The first thing that I thought of, again, I totally agree with them about the staff. We did merger guidelines to move the case law in a direction that strengthens enforcement, which I thought was necessary, and so did Christine Varney, my boss. In terms of what has lasting effect, the case law. Then we can talk about agency capabilities. But they didn't mention case law or anything about that. This is my concern when we look at now at the mid-term report, and we look two years later, three years later, the cases so far are not good for the development of case law. If you want to do stronger antitrust enforcement, which they say they want to do and I want to do. It's a setback. I'm not particularly optimistic about the cases in the pipeline, but we'll see.

[00:21:24.820] - Carl Shapiro

So I think that's a good metric. Of course, it's with considerable lag that we can observe that metric.

[00:21:31.560] - Ginger Jin

I totally agree. I think losing cases without a credible theory of harm, and empirical facts actually would introduce risk to undermine the agency's reputation and is not setting a good precedent in the case law.

[00:21:45.310] - Carl Shapiro

We're seeing somewhat the inevitable consequence. The neo-Brandeisians criticized, let's say, the Obama administration, particularly for being too timid. As somebody who was there, we made choices about which cases where we would like to bring, but we're too risky, so we'd settle. As Jonathan Kanter has said, we need to be more aggressive and take more risks. That's a judgment call, and we'll see how that works out. Let's be clear, when you take a risk, and it goes south; it's a setback to the cause. Just like this Facebook-Within decision recently is a setback, no matter what the neo-Brandeisians may say that somehow it's not. It is, and that's the risk they're taking. I think it's considerable, particularly if you don't pick cases well and if you don't litigate them well.

[00:22:44.460] - Scott Wallsten

I know Larry and Koren and you both want to reply, but just Carl quickly. Do you believe that the administration then would see the short run as successful because it may have reduced potential mergers or reduced firm's willingness to start mergers, but not successful in the long run because this effect on reputation will diminish their ability to engage in enforcement?

[00:23:15.320] - Carl Shapiro

I think in the short run there's some deterrence. The chair of the FTC is clearly a rock star and is better known than any other antitrust official. So it's working for her, as far as I can see. Jonathan Kanter also has developed a reputation as he's aggressive, seems to be working for him. I think it's working for the White House because they're going after a big business. Politically, again, it seems to be working for all the different components who are doing it. But in the short run, the deterrence I'm talking about is not good.

[00:23:51.940] - Speaker 5

You're stopping a lot of pro-competitive mergers. That's not helpful in the long run. It's even worse. I'm very concerned about that, as best one can tell in the midterm.

[00:24:03.460] - Larry White

Let me jump in just for a minute to support something that Ginger and Carl said a few minutes ago about what we heard from Susan Athey and Aviv earlier this morning about the institution building. Hiring economists, et cetera, which is all to the good. That was one of my goals at the Department of Justice. I wish we had heard a little bit more about why is it that there is this widespread impression, certainly among the economists I talked to, that there is a morale problem there. There have been departures. I'm sure Susan and Aviv want to turn that around and that's great. What is it that led to the question that Tom Lenard asked? I wish we'd heard a little bit more about why do you think there is this widespread belief.

[00:25:16.220] - Koren Wong-Ervin

One thing I was going to jump in on a little bit more I said abroad earlier, but is international. The US has lost ground for a long time to the EU being more what countries follow. When it was announced that Lina Khan was becoming chair, I got a lot of emails and calls from around the world from very senior enforcers saying, does this mean that everything the US has taught us for the last decades in terms of consumer welfare standard and economically sound theories, is out the door? I think that I am worried that long standing positions on not doing abusive superior bargaining position or excessive pricing or exploitative abuses, a lot of those have been removed from the FTC's websites. The new Section 5 for Methods of Competition policy statement explicitly uses exploitative abuses, they don't say excessive pricing, but that's what that means abroad. Excessive pricing alone without any exclusionary or predatory conduct. It also talks about abuse of bargaining power. I am concerned and I've had people have me speak at embassies or different things to kind of talk to parts of their government about because I've been told that other parts of their government who have long wanted to protect national champions or local procurement or things like that are using the US as cover.

[00:26:45.690] - Koren Wong-Ervin

They wanted me to talk about we're not like China, right? We don't have one voice. There are a lot of views here. I see kind of three camps, right? The (??Chair cons and moves.??) I hope you don't mind, Carl, maybe where you are, we want some change, but let's not throw out everything. Where I am so we have different views. I think that that's important for people to know.

[00:27:14.500] - Ginger Jin

Larry, to answer your question, the FTC for example, has a tradition of bipartisan consensus building between different people along different side of the aisle. It seems like that culture has been undermined. When Noah Phillips announced that he will resign, according to some media reports, seems like he's concerned that other commissioners are not open to discussion and compromise. At the FTC, when the satisfaction score plummeted, it seemed like one of the reasons there are new internal roles that reduce staff's ability to attend academic research or related conferences to share their opinions and their studies. I think those restrictions probably have contributed to the morale decline. That's just my guess.

[00:28:15.960] - Carl Shapiro

I think it's hard to dispute that Lina Khan had a very rocky start at the FTC in multiple dimensions. Personally, I don't find it so surprising. She didn't have a lot of experience for that job. I think as a midterm, you ask, how is she doing? I say she rather than the whole commission because she is the chair she's in charge of these things. Learning and adjusting after what is now 18 months plus. I'm watching. But it's unfortunate that we had such a rocky start because somebody was put in place who did not have more experience to run the agency.

[00:29:06.520] - Scott Wallsten

Before we move on too far from the international part that Koren brought up. Just a quick sidebar question. There was a report in The Wall Street Journal a few days ago that the FTC called it colluding with EU antitrust authorities to block US mergers. What does that mean? Aren't they supposed to interact with their counterparts? I didn't understand the article. Does anybody have any perspective on that? Larry, go ahead.

[00:29:43.940] - Larry White

Of course there ought to be communication and coordination. I took a quick look at that article. I also saw the collusion phrase, and I said, this is silly. Silly at the description of, there's a problem here. No, there's not. We ought to be seeing coordination. I want to briefly return to a point about Koren's early point about clients. They want certainty. They'd like greater transparency, greater clarity, and that's all to the good. Often clients also want flexibility. They want, mine is a special case. The enforcers need to understand that. There's a tension between clarity, certainty and flexibility. At some level, you can't have it both ways.

[00:31:00.460] - Koren Wong-Ervin

I think this is very different between uncertainty and flexibility. You can have more certainty with some flexibility. I would say antitrust, the economic analysis, efficiency, different things, there's flexibility but actually knowing what the standard is. Are we talking about exclusive dealing concerns only when you're excluding an equally efficient rival and depriving them of minimal efficient scale? Those are the kind of things that a company can look at. They know they're a minimum efficient scale, but if it's things like exploitative or abusive or unfair, I don't know how you judge for that. Every time I make it more difficult for a rival to compete, they complain. I don't think that companies want it both ways. I would like to be able to advise clearly. Here's the risk assessment, and then how important is it to the business? Is your biggest customer saying, I need this or I'm abandoning you? Then you play a little bit more risk. But if you can't even give a meaningful risk assessment, that's really problematic for companies to be able to do things that could be really great.

[00:32:20.680] - Carl Shapiro

Let me pick up on what Koren said about international (???), I largely agree. I served at DOJ in the 90's and then again 2009-2011. In the 90's the EU was not as developed with antitrust. The US was the leader and the Europeans were explicitly learning from us, and we were bringing in Eastern European countries out of the Soviet bloc for competition. The US was totally the leader. Then we set up the ICN right around that time. When I show up again around 2009, after the Bush administration, Europeans are like, well, you guys kind of lost track of the plot here. We had had much more influence internationally, even by then Koren, by ten to twelve years ago. Now it's whiplash because what we taught them, and it really was the US teaching the rest of the world for many years, not to say they didn't contribute in their own. Now it's, you're reversing all the stuff we were convinced of for the last 30 or 40 years. I think it's very confusing. It's it's true across other areas.

[00:33:33.430] - Carl Shapiro

I think an area I compared antitrust to is trade, where the US has backed away from free trade principles, and international free trade agreements. We're doing protectionists, sort of buying America stuff, and the rest of the world was trying to follow you in that direction. It's hard to do now. You reverse, so it gives people cover to go back to what they want to do. It's the reverse of the US message. I think it's unfortunate, but it's not confined to antitrust.

[00:34:02.920] - Ginger Jin

If we look at the whole US antitrust landscape beyond just antitrust agencies, we look at the legislation and the overall societal discussion on this. I'm actually glad that the US is not moving as fast as Europe is. I feel like the soul-searching discussions between many economists, the lawyers, the legislators is a good thing. Of course, we wish things had been not as rocky as it had been. I feel like this kind of widespread discussion and the public attention on this, I hope it will turn out to be a good thing. That the US as a collective effort, is deciding a future direction that's more robust and more long.

[00:34:51.470] - Scott Wallsten

That's a good segue to sort of more talk about mergers and acquisitions. Earlier you asked how have the government's activities towards start up acquisitions changed? In particular, we're going more slowly than

Europe, but do we see any economic effects of these changes yet? And what might you expect to happen?

[00:35:19.840] - Ginger Jin

I want to praise the FTC for issuing a staff report on the big tech acquisitions. We can question why focus on these limited number of big ones and report summary statistics. I think it's a good start to look at the fast changing tech markets. Into the future I hope the US antitrust agencies can take approach to be more proactive, not just looking back ten years. We just learned summary statistics of a very handful number of firms. This landscape is changing so much. I feel like the agencies need expertise and tools to have real time surveillance in this space. We worry about acquisitions in a nascent market or a series of small acquisitions that may build up abusive market power. We really need to do the homework here to understand the landscape, develop robust theory of harm and work on empirical facts needed to support those theories, to draw a line to say which side is under-competitive, which side is pro-competitive, how we make the trade-off between the two.

[00:36:35.640] - Ginger Jin

I think the current rhetoric-heavy approach is not going to get there.

[00:36:46.920] - Scott Wallsten

Larry, do you think this report that Ginger is talking about helps establish the line you're talking about rather than case counts?

[00:37:01.740] - Larry White

It certainly helps this issue. It has to be retrospective of who's acquired what under what circumstances. Ginger has done research in this area. Finding out more about where we've been has to be useful for figuring out where we want to be going. Where has the line been? Are we happy? Are we comfortable with that? Or do we think, no, there's a problem? It's a problem not based on case counts. Problem not based on these guys have been buying up this guy, and this guy, and this guy. It has to be based more on, what were the consequences. That has to be the way of thinking about these issues.

[00:38:09.520] - Carl Shapiro

This FTC report was really helpful laying out all these acquisitions. A lot of people say the four or five big tech firms have acquired several hundred firms over the last 20 years, some metric like this, and none were blocked. Only a few were challenged in any way. So that must be a problem. How does that follow? Why don't you tell me which ones you think were a problem? Let's look at it. I found this report quite helpful. The UK CMA also issued a detailed report on a number of acquisitions they looked at closely, which I think complements the FTC report. They went into more detail on a smaller number of deals. You get back to what Randy Picker mentioned in the last session, which is, take Google. They they made a bunch of acquisitions 2005 through 2009, that they then built out substantially, YouTube notably, Android perhaps more than anything, a tiny thing they bought and made into something extraordinary.

[00:39:27.160] - Carl Shapiro

You can go back and say, maybe that was anticompetitive, most of the people who have that view see they used it to build out another whole area. Google was doing search, then they bought Android. Now they have Android. They have another empire, another large successful business. If you think that's bad per se because you don't like big companies to be sprawling and powerful, then you're going to look at it as bad. But of course, I think most of us would say, well, where's the harm that came from that as opposed to the benefits that came from that? How would you really want to go back and evaluate that in 2006 differently? I doubt it for Android.

[00:40:05.780] - Larry White

Could you even today, the thing that I find very frustrating about the Federal Trade Commission's suit against Meta. Their acquisition of Instagram in 2012, their acquisition of WhatsApp in 2014, greatly buttressed their power in social networking. No, those were small companies at the time, it would have been very hard to make a prediction, very hard to have gotten a federal district court judge to have issued an injunction. Likely the judge never would have heard of any of these things. If you wanted to do something today, what do you do? If you wanted to try to spin off Instagram. This is not like breaking up AT&T in 1984, where you have a bunch of physical facilities at various locations around the country and you had a headquarters that actually wanted the seven operating companies and the remaining long distance plus manufacturing company to be robust and to prosper and tried to do the breakup of the physical facilities, tried to do the allocation of personnel in a way that would allow them to thrive.

[00:41:43.380] - Larry White

That is exactly the opposite of what Meta's incentives would be if the outcome was you have to spin off Instagram. First, what are you spinning off? A brand name, maybe a little bit of IP. Other than that, how do you force people to go in one direction or another? Meta's incentives would be to not try to have a robust, standalone Instagram. I don't think there's been enough thinking about what remedies might be present for these kinds of cases. The world is different from 1984.

[00:42:37.670] - Koren Wong-Ervin

There's been, on the last panel Michael Katz mentioned this, about how the standards, for example, for potential comp are incredibly difficult. They're incredibly difficult to meet. I think it's for good reason, right? I mean, as with any merger, there's two counterfactuals the future world as it is, and the future world with the merger and without it. But when you have actual competition, you have a record. You know what the prices are and what it is likely to look like in the future with the merger. You don't have that with potential competition. I think that it should be a rigor standard. I think a lot of times people overlook that they just assume that this company would have been successful without the synergies and know-how and all the benefits of the acquiring company.

[00:43:37.310] - Ginger Jin

I agree with Koren. I think this is where the merger retrospective will be really helpful. We can't just say we look back and only look at Facebook and Instagram and WhatsApp case and the fact that Facebook grows bigger after those acquisitions. That's kind of the thing that we should condemn. I feel like a merger perspective would tell us what kind of acquisitions in the past have generated what harm to whom, and how that is dominating whatever the procompetitive part in elevation and other things. We have to learn the lesson in order to know how can we tell in the future similar things happen, and we can have some prediction on what to expect when we see the next series of acquisitions that may look problematic. Without that, I just don't see how we can do it.

[00:44:33.180] - Scott Wallsten

That would lead us right into the question of the merger guidelines and what we should expect with those, if anything. Any thoughts on merger guidelines?

[00:44:45.500] - Koren Wong-Ervin

I think in the RFI you can really tell a lot of what they want to do. They ask them as questions and also what we've seen in speeches about returning to some of the older Supreme Court precedents. We've always had Philadelphia National Bank, the presumption for horizontal mergers. I think in previous administrations, there was really an effort to go further. You're in court, you get to rely on it, but to do more of an effects based analysis. I think we're really going to go back to that. Incredible skepticism of things like limitation of double marginalization as sort of part of the math of raising rivals cost. I think it's much more skepticism of it, I think sort of asymmetric burdens. We're really skeptical of EDM and we're skeptical of things like pass through, there's a lot of asymmetry or how you're treating efficiencies. Lastly, I agree we should not really focus on defining a relevant market and market shares, I want to focus on competitive effects.

[00:46:04.080] - Koren Wong-Ervin

But if you're going to use presumptions of illegality based on shares, I don't know how you do that if you don't define markets.

[00:46:10.780] - Carl Shapiro

I think we're going to see an effort to make it easier for the government to win cases across the board. The question is, how do you write guidelines? How will they write guidelines to do that that the courts will accept and not just view as an advocacy piece for the plaintiff appearing in front of them? One thing that's clear is, and then I'm just picking up from the rhetoric of the agencies, particularly Jonathan Kanter, who said more about this. We all talk about the statute, this talks about mergers that may substantially lessen competition. So the "may" is going to get a lot of emphasis. May means may, and it doesn't have to be likely, which goes to the potential competition cases. They're going to push in that direction, a low standard for may. In other words, in terms of probability or likelihood. The other phrase we don't talk about as much tend to create a monopoly. I think it'll be very clear if it's a merger to monopoly; efficiencies don't count at all. Lina Khan suggested efficiencies never count.

[00:47:19.680] - Carl Shapiro

I don't know what they're going to do about that. They don't like efficiencies, there's the question about the case law. More generally, let me quote Jonathan Kanter because I think this is the best guide I've been able to find while we're waiting for these things to actually come out. He said in September, the agency's approach to merger enforcement has fallen out of sync with the values reflected in the Clayton Act and the standards established by the courts for its application merger enforcement has become disconnected from the competitive reality of our economy it is my hope that revised guidelines address this disconnect in both respects. Having worked on the guidelines in 2010, I don't know which sense they're disconnected from the competitive realities. At least my efforts on it were to try to make them very much reflective of the competitive realities in different markets. They don't talk about zero price markets, they don't talk about platforms, you can build out. The rhetoric has been so negative on merger enforcement being out of sync and messed up.

[00:48:40.120] - Carl Shapiro

It seems like it's setting them up to have to do some more radical things. That makes me nervous because I don't know what those will be that will work. I think that's the challenge. On this point about structure versus effects, I think we're going to see they want to have it both ways. You can't not define markets and HHI. That's the case law in Philadelphia International Bank. That is how the government wins cases. It would be negligent not to lay that out in the guidelines. You have to do that, or it would be malpractice to bring a merger case and not define the market. I predict they're going to say, we do that, and they'll talk about market definition and then probably lower the HHI threshold. You do that and say that's one way to win, but another way to win is to directly show effects. Either way works, you don't have to do both.

[00:49:44.110] - Carl Shapiro

They sort of have it both ways in a pro-enforcement manner.

[00:49:53.170] - Larry White

To clarify, yes, the vertical merger guidelines were withdrawn by the Federal Trade Commission sometime in the summer of 2021. The horizontal merger guidelines are still out there, still in principle where people look, although all of us are eagerly awaiting to see what the new version looks like. We heard from Aviv and Susan earlier today about the importance of economics, that continues to be the case at the two agencies. I think the new merger guidelines that come out are going to be an interesting indication of just how important is economic still at the agencies versus, something else.

[00:51:05.510] - Carl Shapiro

Tim Wu, when he was leaving the White House in his role on the National Economic Council, one of the things he listed, he was most proud of his accomplishments was revising the merger guidelines. That shows the salience. It may be a little premature to declare victory on this when they haven't even released yet, but he put it up high on his list.

[00:51:31.550] - Ginger Jin

It's important to remember that guidelines are not laws, and they are widely accepted, at least the horizontal ones, by the court because they make sense. They set up principles, allowing both sides and the judge to think through the problem in both legal and economic sense. If a new one does not have similar credibility, it's not going to be adopted by the court. That could be a setback, no matter how rhetoric or glory it sounds like.

[00:52:08.810] - Scott Wallsten

How should the antitrust authorities should take into account competition that conflicts with other goals? We know that administrations and governments always have conflicting goals. That's just the way it is. But there's so much competition coming from China. TikTok is eating Facebook's lunch, Temu is challenging Amazon, and on. At the same time, politicians want to block that kind of competition. As just objective analysis of the markets how do they take this into account? Should they be considering it competition? Or should they recognize that the administration has protectionist goals or even national security goals? How do you deal with that?

[00:53:03.650] - Koren Wong-Ervin

The Chamber of Commerce had a report on this years back. I testified on the Hill about proposing a person in the White House that did an interagency coordination, if we were going to have any chance to be competitive against China and the rest of the countries who are clearly doing protectionism, I'm really worried about that. With Tad Lipsky in the White House I might be okay with it, but I don't know who's going to be in the White House. I really would like us to stay pure with antitrust. When she was chair of the FTC, Edith Ramirez gave a beautiful speech in Beijing about this and the dangers. Certainly not at the competition of the agencies, they're very ill-equipped to weigh and balance other factors. This much efficiency is good for consumers, but we already have some of it with CFIUS and other things. I would really want to keep antitrust pure.

[00:54:09.010] - Carl Shapiro

I agree with that.

[00:54:11.890] - Larry White

I'm a big fan of exactly that. The antitrust problems are extremely difficult as they are, and trying to introduce those extra trade offs is just going to make them a whole lot harder. The agencies are going to have to add expertise that they're not going to have the budgets for. At the end of the day, those sorts of trade offs ought to be up at a higher pay grade at a higher level at the White House coordination level, keep the antitrust agencies focused on antitrust.

[00:54:56.670] - Carl Shapiro

I agree with that too. I happen to be a big environmentalist, but I don't think we should block a merger because the acquiring company has a bad environmental record, I don't think the statute permits that.

How are you going to do that? Where do you draw the lines? Where do you limit that? On the national security sort of trade issue, there is an important connection that we can do as antitrust folks. If we think that foreign suppliers will be facing tariffs or quotas or be blocked out somehow, that affects the competitive analysis of a merger. You might be much more concerned about US firms merging if the foreign firms will not be able to be bringing in imports. This was an issue in Whirlpool-Maytag, which was allowed during the Bush administration as a merger. Whirlpool argued that Korean companies, LG and others, would bring in all these washing machines, and as soon as the deal went through, they worked with the ITC to stop those imports from coming in. TikTok would be an issue here too, presumably.

[00:56:09.330] - Carl Shapiro

If that might get blocked or limited, then that affects how you think about competition in that space, such as Facebook. We should include that factor but as part of the competitive effects analysis.

[00:56:23.810] - Ginger Jin

I totally agree that we should keep antitrust in its own focus now, but I think TikTok and Temo probably tell us something about what's the barrier to entry and how hard it is. There has been literature talking about digital platforms and how they have a lot of network effects that lead to winner takes all. Here we see young firms from China that are able to enter into big markets. I think that tells us something about the barrier to entry and that should be incorporated when we consider regulation or legislation or antitrust enforcement in this area.

[00:57:13.370] - Koren Wong-Ervin

I think it's a good example of sort of the network effects can cut both ways. They can certainly entrench a dominant player, but they can also sort of hasten the demise of one. Maybe starting in China where there's this is a spontaneous kind of order, and it's that they're not so insurmountable in the market.

[00:57:42.550] - Scott Wallsten

With that, we're coming right up on noon and that's time. Thank you all so much for joining us. Really appreciate it. I thought it was a great conversation, talk to you all soon.